89-1176

No. ____

Supreme Court, U.S.
FILED
JAN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court Of The United States

October Term, 1989

HORTON AUTOMATICS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GARY L. LIEBER
Counsel of Record
JOHN A. MCGUINN
PORTER, WRIGHT, MORRIS & ARTHUR
1233 20th Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 778-3000

A. KENT MCCULLOCH
Director of Industrial Relations
The Dallas Corporation
P.O. Box 400150
Dallas, TX 75240
(214) 233-6611

Attorneys for Petitioner

January 25, 1990

Balmar Legal Publishing Division, Washington, D.C., (202) 659-3610

QUESTIONS PRESENTED

1. Whether the Court of Appeals misapprehended or grossly misapplied the "substantial evidence" rule enunciated in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), in circumstances where the Court enforced the Board's order in spite of the Court's specific ruling that several key findings of the Board, integral to its conclusions, were not supported by substantial evidence on the record considered as a whole.

2. Whether the Court of Appeals ignored the standard in mixed motive conduct cases enunciated by the Board in *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), and specifically adopted by this Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

LIST OF PARTIES

The parties to the proceedings below were the petitioner Horton Automatics and the respondent National Labor Relations Board.

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

Petitioner Horton Automatics is a division of Dallas Corporation, an Indiana corporation.

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	6
I. The Decision Below Is Contrary To Decisions Of This Court And Presents This Court An Opportunity To Correct A Recurring Problem In The Proper Scope Of Judicial Review Of Administrative Agency Decisions	6
II. The Failure Of The Court Of Appeals To Apply The Board's Mixed Motive Analysis, Approved By This Court, Threatens A Return To The Conflict In The Circuit Courts Of Appeals On This Subject Prior To 1983	14
CONCLUSION	17
APPENDIX	1a

TABLE OF AUTHORITIES

CASES	PAGE
Boston Mut. Life Ins. Co. v. NLRB, 692 F.2d 169 (1st Cir. 1982)	14
Golden *State Bottling Co. v. NLRB*, 414 U.S. 168 (1973)	12
International Hat Co. v. NLRB ,771 F.2d 1170 (8th Cir. 1985)	16
Mackowiak v. University Nuclear SYS.,735 F.2d 1159 (9th Cir. 1984)	16
Medline Indus. v. NLRB, 593 F.2d 788 (7th Cir. 1979)	14
NLRb v. American Geri-Care, Inc., 697 F.2d 56 (2d Cir. 1982), *cert. denied*, 461 U.S. 906 (1983)	14
NLRB v. Baptist Hospital, 442 U.S. 773 (1979)	12
NLRB v. Columbia Products Corp., 141 F.2d 687 (2d Cir. 1944)	7
NLRB v. Florida Steel Corp., 586 F.2d 436 (5th Cir. 1978)	11
NLRB v. Norbar, Inc., 752 F.2d 235 (6th Cir. 1985)	12
NLRB v. S.E. Nichols of Ohio, Inc., 704 F.2d 921 (6th Cir.), *cert. denied*, 464 U.S. 914 (1983)	13
NLRB v. Transportation Management Corp., 462 U.S. 393 (1983)	15, 16
NLRB v. Walton Mfg. Co., 369 U.S. 404 (1962) (per curiam)	12
Retail, Wholesale and Dep't Store Union v. NLRB, 466 F.2d 380 (D.C. Cir. 1972)	14
Singletary v. Bowen, 798 F.2d 818 (5th Cir. 1986)	12
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)	*passim*

CASES (Continued) **PAGE**

Wright Line, *A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (lst Cir. 1981), *cert. denied*, 455 U.S. 989 (1982) 14, 15, 16

STATUTES AND REGULATIONS

28 U.S.C. §1254(1) 2

29 U.S.C. §158(a)(3) Unfair Labor Practices 2

29 U.S.C. §160(f) 2

Administrative Procedure Act 6

National Labor Relations Board Rules and Regulations and Statements of Procedures, Series 8, As Amended, Section 102.69 (29 C.F.R. §102.69 (1989)) 11

Taft-Hartley Act 6

MISCELLANEOUS

H.R. Rep. No. 510, 80th Cong. 1st Sess. 56, *reprinted in* 1947 U.S. Code Cong. Serv. 1135 . . . . . 6, 7

Weis, *A Judicial Perspective on Deference To Administrative Agencies: Some Grenades from the Trenches*, 2 Admin. L.J. 301 (1988) 12, 13

No.___

In The

Supreme Court Of The United States

October Term, 1989

HORTON AUTOMATICS,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner Horton Automatics respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled proceeding on August 15, 1989.[1]

OPINIONS BELOW

The decision of the Court of Appeals for the Fifth Circuit is reported at 884 F.2d 574, and the unpublished opinion is reprinted in the Appendix (hereinafter "App."), at 3a-21a.

The Decision and Order of the National Labor Relations Board and the Administrative Law Judge's Decision are reported at 289

---

[1] On August 29, 1989, Petitioner filed with the Fifth Circuit, both a petition for Rehearing and a Suggestion for Rehearing En Banc. The Fifth Circuit issued an order on October 2, 1989 denying both the Petition for Rehearing and the Suggestion for Rehearing En Banc. The Order is reprinted at App. 1a, 2a.

NLRB No. 57 (1988), and they are reprinted in the Appendix hereto, at App. 22a-71a.

JURISDICTION

On July 27, 1988, Horton Automatics filed a Petition under 29 U.S.C. §160(f) for Review of a Decision and Order issued by the National Labor Relations Board on June 28, 1988. On September 14, 1988, the Board filed a Cross-Application for Enforcement. On August 15, 1989, the Court of Appeals entered a final judgment enforcing the Board's decision and order. On October 2, 1989, the Court of Appeals denied Horton Automatics' petition for rehearing and rehearing *en banc*. On December 6, 1989, Justice White ordered that the time for filing this petition for writ of certiorari be extended to and including January 25, 1990.

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

29 U.S.C. §158(a)(3) Unfair Labor Practices.

> (a) It shall be an unfair labor practice for an employer —
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . .

29 U.S.C. §160(f) Review of Final Order of Board on Petition to court.

> Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by

substantial evidence on the record considered as a whole shall in like manner be conclusive.

STATEMENT OF THE CASE

Horton Automatics designs, manufactures and sells automatic doors and related products. Its leading product is the electric slide door which it invented. The electric slide door represented 57% of its business in 1983, 53% of its business in 1984, 53% of its business in 1985, and 47% of its business in 1986. During most of 1986, the Company employed slightly over one hundred hourly employees, of which approximately thirty worked in its door department.

The Company is known in the trade as a "custom house". Virtually all of the company's products are built to the customers' order and specification. As a result, the Company does not maintain any significant inventory of products.

Based upon a steady improvement in business during 1985, Horton Automatics expanded its operations. Beginning in July 1985, the Company added to its hourly workforce so that by the end of the year that workforce had increased from 85 to 107 employees. In addition, the substantial increase in net sales and profit in 1985 helped to persuade the Company's parent, the Dallas Corporation, to finance a one million dollar capital improvement in the form of an addition to Horton Automatics' then current plant facility. This addition opened in August 1986.

The Company's improved performance was short-lived. Its net sales failed to meet its budget projections for each of the twelve months of 1986, and total net sales for 1986 were nearly $1.4 million below the projection of $13,600,000. Although the Company's net sales during 1986 were 14% above 1985's figure, the increase was only slightly more than half of the 26% increase which had been projected.

The Company commenced economic cutbacks to deal with this unexpected shortfall: (a) daily layoffs were instituted throughout the first part of 1986 where each hourly employee in the plant was laid off one day a month; (b) two marketing consultants were discharged in June; and (c) that same month, the advertising budget was slashed,

postponing, until 1987, advertising commitments which had already been made and scaling back future advertising commitments.

On October 8, 1986, the International Union of Electronics, Electrical, Technical, Salaried and Machine Workers, AFL-CIO, District 11, filed an election petition with the NLRB seeking to represent a unit of all of Petitioner's hourly production and maintenance employees. On the following day, the Company received correspondence from the Union indicating its desire to organize Petitioner's employees, and formal notice from the NLRB that an election petition had been filed. Prior to receiving the Union's letter, the Company was completely unaware that it was the subject of Union organizing activity. On October 21, the Union sent a second letter to the Company, this time listing nine employees who were members of the Union's in-plant voluntary organizing committee. On October 30, the NLRB's Regional Director approved a voluntary stipulation agreement which set the election for December 12, 1986.

While net sales figures had improved slightly during the summer season (normally the Company's busiest time), they remained far below the budget projection for each month. The Company's economic condition had continued to deteriorate during the fall until as of November 1, 1986, the Company's backlog of orders was at $800,000, the lowest it had been since February 1985 when the Company had over twenty fewer employees. As a practical result of this eroding economic climate, employees in the door department had to be rotated to other positions to keep them busy.

At this point, Plant Manager Bob Carrier, who had joined the Company in February 1986, concluded that since the current orders were only sufficient to keep the operation going for half the month, a layoff was necessary. Carrier consulted the Corporate Vice President of Human Resources, Alan Bashor, who after review with corporate labor counsel, approved the layoff provided employees were selected in a specified manner. Pursuant to those requirements, Carrier first selected ten persons on the basis of seniority within those areas most closely connected with the production of doors. Carrier then looked through the personnel records of each employee slated to be laid off to determine if any of those employees had the experience to work in another area of the plant. As a result of this review, two employees

initially selected for layoff, including one of the members of the Union's in-plant voluntary organizing committee, "bumped" less senior employees in other areas.

On November 3, 1986, the Company informed all of the employees by a written memorandum of the decision to implement a layoff. That memorandum stated the reasons for the layoff, quoted the Company handbook provision stating that principles of seniority would be honored unless the senior employee could not perform the job, and closed by stating that the Company hoped the layoffs would only be temporary. Another memorandum was issued the following day announcing that the layoff would encompass 10% of the workforce and would be effective on November 10. Although the November 4 memorandum stated that another 10% layoff was possible, it also indicated, "When work picks up again, employees will be recalled ..." and again expressed a hope "that the down turn in orders will be temporary ...." The ten persons selected for layoff were disclosed that same date.

When sales during the month of November dropped precipitously from the previous month,[2] the Company concluded that the downturn in orders was not temporary and that the ten laid off employees should be told that they would not be coming back, at least in the foreseeable future. Therefore, on November 26, 1986, the Company issued a letter to each laid off employee which stated:

> We regret to inform you that the temporary layoff must now be considered permanent. We are therefore advising you of your need to convert or to obtain health insurance from an outside source.
>
> We are very sorry for this unfortunate turn of events. We thank you for your cooperation and sincere effort during your employment at Horton Automatics.

On January 12, 1987, the Union filed unfair labor practice charges alleging independent violations of Section 8(a)(1) in addition to a claim that the layoff violated Section 8(a)(3) of the Act. The NLRB's General Counsel issued its consolidated complaint on

---

[2] Sales for the month of November were $189,000 less than the previous month and $269,000, or 21.5% less than projected.

February 20, 1987. Following a trial which was conducted in March and May of 1987, the ALJ ruled, on November 27, 1987, against the Company on every claim. The ALJ ordered the laid-off employees to be reinstated with back pay and issued a cease and desist order relating to the Section 8(a)(1) violations. On June 28, 1988, a panel of the NLRB perfunctorily adopted the findings of the ALJ and, with one minor addition, affirmed the ALJ's order. The Court of Appeals, although it enforced the order of the Board in its entirety, found substantial flaws in the major holding of the ALJ that the original layoff of employees was unlawful and in the method by which the ALJ resolved numerous credibility issues.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is Contrary To Decisions Of This Court And Presents This Court An Opportunity To Correct A Recurring Problem In The Proper Scope Of Judicial Review Of Administrative Agency Decisions.

In *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), this Court, in construing the Administrative Procedure Act and the Taft-Hartley Act, unanimously reacted to judicial and legislative criticisms that the standard of judicial review of agency action had been perceived to be so limited that it resulted in "shocking injustices" and "intimations of judicial 'abdication'". 340 U.S. at 479. The Court found that when the Senate Committee considering the Taft-Hartley Act conformed the standard of judicial review of Board decisions to the provisions of the Administrative Procedure Act requiring agency action to be supported by substantial evidence "on the record as a whole," it demonstrated "a purpose to impose on courts a responsibility which has not always been recognized". 340 U.S. at 489. Instead of simply determining whether agency findings were supported "merely on the basis of evidence which in and of itself justified it," Courts of Appeals were instructed that "the substantiality of evidence must take into account whatever in the record fairly detracts from its weight". 340 U.S. at 487-88.

It is also noteworthy that the House Report on the Taft-Hartley Act's expansion of the scope of judicial review gave examples of prior

decisions which would be "precluded" by reason of the new standard of substantial evidence "on the record considered as a whole." H.R. Rep. No. 510, 80th Cong. 1st Sess. 56, *reprinted in* 1947 U.S. Code Cong. Serv. 1135, 1162-63. One of these decisions, *NLRB v. Columbia Products Corp.*, 141 F.2d 687 (2d Cir. 1944), sustained a finding of discriminatory discharge in the following back-handed manner:

> Though it may strain our credulity, if it does not quite break it down, we must accept it ....

Id. at 688.

It is submitted that, after nearly fifty years, the Court of Appeals in the present case enforced the Board's order on the same legislatively discredited basis as the decision quoted above and that this Court should "intervene" because "the standard appears to have been misapprehended or grossly misapplied". 340 U.S. at 491.

In this case, the Court of Appeals was asked to review a decision by the Board's Administrative Law Judge, adopted *pro forma* by the Board, that a layoff of ten employees on November 10, 1986 violated Section 8(a)(3) of the Act because it was motivated by the union activities of the employees laid off and that the letters sent to the laid off employees dated November 26, 1986 making their layoff permanent also violated Section 8(a)(3) for the same reason.[3]

The Court of Appeals' decision sought to separate these inter-related findings of the ALJ, purporting not to pass on the legality of the initial layoff, but finding evidence to support the ALJ's conclusion that the November 26, 1986 conversion of that layoff to a permanent one was a violation of the Act.

From the start, this was an impossible judicial task since there is no way of knowing how the ALJ's finding that the November 10, 1986 layoff was unlawful affected his inter-related finding that the November 26, 1986 letters violated the same provision of the Act.

Although purporting not to pass on the lawfulness of the November 10, 1986 layoff, the Court noted "the lack of substantial evidence in the record for many of the ALJ's crucial findings" on the layoff

---

[3] The petition for review also challenged all of the alleged violations of Section 8(a)(1).

issue (App. 8a). The Court had the following specific criticisms of the ALJ's findings regarding the layoff:

(a) "... inconsistencies in the testimony of the laid off employees and the Union representative that are not mentioned by the ALJ" (App. 8a);

(b) the total impeachment of the Union representative Martinez as to when he identified the employees engaged in leafletting the Company – "evidence" critical to the ALJ's finding that the Company had knowledge of the Union activities of the laid-off employees (App. 8a-9a);

(c) the ALJ's failure to "even mention the uncontroverted testimony of President Hewitt that one of the laid off employees, Leonard Hoyt, approached him and offered to work for the Company to defeat the Union" (App 9a);

(d) "The ALJ uniformly credits the testimony of the witnesses for the General Counsel and then uses their testimony to discredit otherwise competent testimony of Company supervisors and executives .... That reasoning is unjustifiably broad" (App. 9a);

(e) in response to the ALJ's claim that the layoff was not economically motivated because the Company hired thirteen employees between June and October, 1986, the Court stated that "Nor would we so quickly reject Horton's economic defense," noting that "it is undisputed that these [13] workers were hired to replace employees who quit and at most only two of these employees were in the manufacturing departments affected by the layoff .... Thus it was erroneous for the ALJ to attach significance to the hiring of these replacement employees" (App. lOa);

(f) "The ALJ's most serious omission is that he ignored the uncontroverted evidence of the drop in Horton's profitability from 1985 to 1986" (App. lla);

(g) with respect to the refusal of the ALJ to permit the Company to rely on a prior consistent statement to corroborate the Company's case that it was overstaffed in early 1986 the Court stated "the ALJ erred .... Since the ALJ discredited Carrier's oral testimony this error was probably prejudicial" (App. lOa); and

(h) finally, the Court noted "the ALJ's calculations of vent production were mistaken" in refutation of the ALJ's conclusion that a layoff was not economically justified (App. lOa).

Having thus decimated the major holding of the ALJ, the Court of Appeals turned to what was essentially a corollary finding of the ALJ – clearly related to his major and discredited layoff finding – and purported to find substantial evidence to support a violation of the Act in the Company's November 26, 1986 letter to the laid off employees making their layoffs permanent.

This totally artificial separation by the Court of Appeals of what the ALJ clearly found to be inter-related conduct yielded a wholly different result. It was as if the Court of Appeals were evaluating two totally different cases involving two totally different sets of witnesses and two ALJs. Whereas the Court of Appeals found a multitude of flaws and lack of substantial evidence to support the ALJ's reasoning on the layoff issue, when it segmented the November 26, 1986 permanent layoff issue and focused its attention solely on those parts of the record involving that issue, it found substantial evidence to support a violation. In short, the Court of Appeals fell squarely into the vice the *Universal Camera* Court condemned in 1951 of determining whether findings were supported "merely on the basis of evidence which in and of itself justified it," instead of looking at the record as a whole.

The anomalies of this discredited approach abound. Whereas in the layoff portion of the record, the Court notes as an "important point" that Union representative " ... Martinez' testimony was directly impeached" (App. 8a), on the notice of permanent layoff portion of the record the Court noted, *uncritically*, that the ALJ credited Martinez' testimony denying that he ever told laid off employees they would be quickly rehired. Again, in a portion of the record involving an alleged threat by supervisor Elizalde to employee Licon, the Court noted, in opposition to the ALJ, "We disagree that Elizalde's recollection *on the record as whole*, or in regard to this incident, was selective and poor. He testified with few lapses in memory for about 75 pages of transcript ...." (App. 13a, emphasis added). In the same sentence, the Court noted that "Licon's testimony on cross-examination casts substantial doubt on what was actually said and whether Elizalde even

mentioned the union" (App. 13a). Yet on the portion of the record involving the notice of permanent layoff, the Court uncritically accepted Licon's testimony that Elizalde told him that the permanently laid off employees would be ineligible to vote in the election (App. 12a).

The remainder of the Court's analysis of the notice of permanent layoff issue consists of speculation and a total lack of evaluation of countervailing evidence and inferences.

1. Employee Handbook. The Court fundamentally misconstrued the pertinent provision of the employee handbook (App. lla). Section C of the handbook pertains to and is entitled "Seniority" and states, under subsection 1 thereof, subtitled "Layoff and Recall", "Employees will be recalled from layoff in the order of their seniority provided they have the ability, skill and willingness to perform the available work in an efficient manner. Subsection 3 of that same section, entitled "Loss of Seniority", states that employees shall not lose their seniority unless the employee "remains off the payroll of the company for any reason for a period of more than one (l) year or a period equal to his seniority with the company as of the time of his layoff or leave of absence whichever is lesser".

Accordingly, nothing in the handbook prohibits the Company from denoting a layoff "permanent". Employees still retained recall rights. Indeed, when the layoff was first announced, the Company advised the employees that they still retained recall rights consistent with Section C of the handbook which the Company referenced when it first announced the layoff. The Company never deviated from the handbook. The Company issued the notice of permanent layoff, consistent with common industrial practice, to advise the laid-off employees that the layoff would be extensive because of even worsening economic conditions. The employees had inquired about how long they would be maintained on the Company's health insurance and this notice was intended to advise them that they should look for other employment and avoid any gap in coverage. Additionally, the Company had been advised that one of the laid-off employees had assumed that he would soon be recalled and the notice of permanent layoff was intended to advise him and the others that this would not occur.

2. Company Challenge To Ballots Of Laid Off Employees. The Court found the Company's challenge to the ballots of the permanently laid off employees provided support for the conclusion that the notice of permanent layoff was illegal, noting "such a challenge strongly suggests that this Company believed their vote would be unfavorable" (App. 12a). The only permissible, non-speculative "strong" suggestion resulting from a party's challenge to a voter is that party's belief that the voter is not eligible to vote. The Court's "suggestion" serves only to chill the rights guaranteed under the Act and the Board's Rules and Regulations that parties may freely exercise challenges to voters they believe are not eligible to vote.[4]

The Court of Appeals concluded that:

> Thus, while the Company's explanation for the November 26 notice might have properly been credited, we find substantial evidence in support of the ALJ's conclusion that a desire to prevent the ten employees from engaging in protected conduct (voting) was a "motivating factor".

(App. 12a)

Thus, the Court of Appeals did not expressly discredit the Company's explanation for its issuance of the notice of permanent layoff. However, the result reached by the Court was only achieved by tortuously separating the November 10 layoff from the November 26 notice of permanent layoff, which the ALJ had considered together, and then considering separately whether substantial evidence supported each discrete event. Additionally, as just noted, the result was achieved by uncritically accepting some of the credibility determinations made by the ALJ regarding testimony by the same Union witnesses (Martinez and Licon) that the Court had roundly condemned as being the product of the ALJ's routinely crediting the Union's witnesses and discrediting all of the Company's witnesses (App. 9a).[5]

---

[4] *See* National Labor Relations Board Rules and Regulations and Statements of Procedures, Series 8, As Amended, Section 102.69 (29 C.F.R. §102.69 (1989)).

[5] In an earlier case, the Fifth Circuit reversed ALJ credibility determinations, stating, "It would appear that the ALJ used credibility when it favored the Union and rejected it when it supported the Company. We do not think the credibility of a witness depends on whose ox is being gored". *NLRB v. Florida Steel Corp.*, 586 F.2d 436, 441 (5th Cir. 1978).

This approach, it is submitted, runs squarely against the admonition of *Universal Camera* that findings must be supported by substantial evidence *on the record considered as a whole* and not by "... a simple search of the record for isolated bits of evidence which support the ... decision". *Singletary v. Bowen*, 798 F.2d 818 (5th Cir. 1986) ("Once determined not credible in a material matter, we have some difficulty accepting Green's uncorroborated testimony concerning the circumstances of his own termination").

If left unchecked by this Court, the approach of this Court of Appeals in segmenting what is essentially a continuous course of conduct into individual elements, then combing that portion of the record involving that element to determine whether or not that element is separately supported by substantial evidence – without regard to other elements of the case where substantial evidence was found seriously wanting – will bog the Courts of Appeals down in a morass of minutiae that is both unnecessary and grossly inconsistent with the far simpler command of *Universal Camera*. For example, it would considerably ease the burden on Courts of Appeals, when confronted with an agency decision as flawed as the Court found this one to be, to simply point out those major flaws in the agency's basic decision and then remand the case to the agency itself in light of the Court's suggestions, to reconstruct the details of its decision. That is in fact the command of *Universal Camera* to the Courts of Appeals. *See, e.g., NLRB v. Norbar, Inc.*, 752 F.2d 235, 243 (6th Cir. 1985), where the Court remanded to the Board a Section 8(a)(3) allegation because "[t]he premises upon which the ALJ made his determination with respect to the Seitz termination, furthermore, have been substantially undercut by the NLRB and by our decision in respect to the other terminations involved in this controversy".

Since 1951, this Court has granted petitions for certiorari to uphold or clarify the principles of *Universal Camera* where Courts of Appeals have misapprehended or grossly misapplied these principles. *See, e.g., NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1962) (per curiam); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 172-73 (1973); *NLRB v. Baptist Hospital*, 442 U.S. 773-82 (1979).

A noted judicial commentator has recently revived the concerns expressed by this Court in the *Universal Camera* case. In a recent

article, Judge Joseph F. Weis, Jr. of the United States Court of Appeals for the Third Circuit made the following trenchant observations:

> A judge has the duty to scrutinize closely each case and not defer blindly to administrative agency pronouncements. It is not the role of the courts to rubber stamp administrative proceedings that are erroneous.

A Judicial Perspective on Deference to Administrative Agencies: Some Grenades from the Trenches, 2 Admin. L. J. 301, 304 (1988).

> The vigorous judicial review contemplated by Congress when it enacted the APA has been diluted over the past forty years ....
>
> Courts too often fail to question the reasons advanced for judicial deference in administrative law cases. Unfortunately, judges have retreated from focusing on the need for genuine administrative expertise and then defining the extent of deference consistent with sound principles of judicial review. Instead, courts have at times allowed the government to put its thumb on the scale of justice and weigh the balance unfairly against citizen litigants. *High Craft Clothing Co. v. NLRB* suggested that a reviewing court should carefully analyze the circumstances in each case to determine if deference is due and, if so, how much. Without that scrutiny there is a danger that indiscriminate judicial deference may amount to judicial abdication.

Id. at 306-07 (footnotes omitted).

The various Courts of Appeals have continued to struggle with the application of *Universal Camera* and its principles for implementing the judicial deference to agency findings of fact. The continuing struggle is illustrated by both the Fifth Circuit's treatment of this case as well as by the various Circuits' attempts to apply a universal standard to the judicial deference rule. A survey of the Circuits identifies that various conflicting standards have been applied ranging from a "rational basis" standard to a standard that upholds agency findings of fact unless those findings are "hopelessly incredible" or "contradict" the "law of nature". *See, NLRB v. S.E. Nichols of Ohio, Inc.*, 704 F.2d 921, 923 (6th Cir.) ("rational basis"), *cert. denied*, 464

U.S. 914 (1983); *NLRB v. American Geri-Care, Inc.*, 697 F.2d 56, 60 (2d Cir. 1982), *cert. denied* 461 U.S. 906 (1983); *Boston Mut. Life Ins. v. NLRB*, 692 F.2d 169, 171 (lst Cir. 1982) ("within the bounds of reason"); *Retail, Wholesale and Dep't Store Union v. NLRB*, 466 F.2d 380, 387 (D.C. Cir. 1972) ("hopelessly incredible"); *Medline Indus. v. NLRB*, 593 F.2d 788, 795 (7th Cir. 1979) (deference in the absence of "exceptional circumstances").

The standards applied by the various Circuit Courts of Appeals are not only conflicting but, in many cases, demonstrate, consistent with the comments of Judge Weis that there has been a *de facto* return to the pre-*Universal Camera* rules. This case is the perfect instrument for the kind of reexamination suggested by Judge Weis. Here the Court properly concluded that the foundational factual resolutions of the ALJ were wrong and illogical. Yet, under the guise of the substantial evidence test, the Court uncritically affirmed the Board's Order by a process of dissecting the record in a fashion directly contradictory to the commands of this Court's instructions set forth in *Universal Camera*.

II. The Failure Of The Court Of Appeals To Apply The Board's Mixed Motive Analysis, Approved By This Court, Threatens A Return To The Conflict In The Circuit Courts Of Appeals On This Subject Prior To 1983

After decades of grappling with the subject of employer conduct arguably motivated by both a legitimate business justification and an unlawful motive violating employee's Section 7 rights, the Board in *Wright Line, A Div. of Wright Line, Inc.*, 251 NLRB 1083 (1980), *enf'd*, 662 F.2d 899 (lst Cir. 1981), *cert. denied*, 455 U.S. 989 (1982), provided a reformulation of the analysis allocating the burden of proof in such cases. It determined that the General Counsel had the burden of persuading the Board that an antiunion animus contributed to the employer conduct challenged, without changing the ultimate burden of proof, which remained with the General Counsel. The employer, even though failing to meet or neutralize the General Counsel's showing, could avoid a finding of a violation of the Act by demonstrating by a preponderance of the evidence that the employer conduct

would have taken place absent any protected activities engaged in by the employees adversely affected by the employer's conduct.

The Board's reformulation in *Wright Line* drew a mixed reaction from the Courts of Appeals as recounted by this Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). The First, Second and Third Circuits rejected the analysis as inconsistent with the command of Section 8(a)(3), while the Seventh, Eighth and Ninth Circuits approved the analysis. 462 U.S. at 397, n.3. In *Transportation Management*, this Court sought to put an end to this conflict in the circuits by unanimously adopting the *Wright Line* analysis.

This case was, therefore, a prime candidate for the *Wright Line* analysis since the General Counsel claimed that the layoff and subsequent notification that the layoff was permanent were motivated primarily by the protected activities of the laid off employees, while the Company argued that the layoff and subsequent notification were the product of economic forces unrelated to the employees' protected activities. Indeed, the ALJ sought to make such an analysis (App. 59a-64a) and that analysis was directly attacked in the Company's petition for review.

Yet the Court of Appeals totally ignored the *Wright Line* analysis and in the process created a whole new test which is totally at odds with *Wright Line*:

> In short, we find substantial evidence in the record to support the ALJ's findings that the decision to notify the employees that their layoff was permanent was motivated *in part* by anti-union animus.

(App. 11a, emphasis added.)

> Thus, while the Company's explanation for the November 26 notice might have been properly credited, we find substantial evidence in support of the ALJ's conclusion that a desire to prevent the ten employees from engaging in protected conduct (voting) was *a "motivating factor"*.

(App. 12a, emphasis added.)

The vice in these conclusions is that whether the employees' protected activities were "in part" or "a" motivating factor in the announcement that the layoff would be permanent satisfies only the

initial burden of the General Counsel under the *Wright Line* analysis, which mandates that the Board and the Courts of Appeals make the further determination of whether the announcement of permanent layoff would have taken place for the economic reasons stated by the employer even absent any protected activities engaged in by the employees. Generally, this analysis results in a determination of whether the Company's economic justification for the conduct complained of was a pretext.

Not only did the Court make no findings of "pretext," or even cite to the *Wright Line* case, but elsewhere the Court made clear its view that the original layoff, contrary to the conclusion of the ALJ, was motivated by legitimate economic factors, most notably "the uncontroverted evidence of the drop in Horton's profitability from 1985 to 1986" (App. lla). Undoubtedly, the Court had that evidence in mind when it stated that "... the Company's explanation for the November 26 notice might have been properly credited ...." (App. 12a).

When confronted with an agency determination that fails to apply the dual motive case, the Courts of Appeals have remanded the case back to the agency to resolve the matter under that standard. *International Hat Co. v. NLRB*, 771 F.2d 1170 (8th Cir. 1985); *Mackowiak v. University Nuclear SYS.*, 735 F.2d 1159 (9th Cir. 1984). A remand to the Court of Appeals would, therefore, absent additional considerations, normally be the appropriate step to take in this case. However, given the Court's erroneous application of *Universal Camera* and the substantial evidence test, and that the application of the appropriate dual-motive test cannot be properly considered without reference to the fact-intensive findings that were erroneously analyzed by the Court of Appeals, it is respectfully submitted that the only logical approach is for this Court to consider both issues.

This Court should, therefore, grant the present petition for certiorari to insure that the Courts of Appeals correctly apply this Court's decision in *Transportation Management*, including its adoption of *Wright Line*, and not revert to the conflicts between the circuits existing on this subject prior to 1983.

CONCLUSION

For the foregoing reasons the petitioner respectfully requests that the petition for certiorari be granted.

Respectfully submitted,

Gary L. Lieber
Counsel of Record
John A. McGuinn
Porter, Wright, Morris
& Arthur
1233 20th Street, N.W.
Washington, D.C. 20036
(202) 778-3000

A. Kent McCulloch, Esq.
Director of Industrial
Relations
The Dallas Corporation
P.O. Box 400150
Dallas, Texas 75240
(214) 233-6611

Attorneys for Petitioner

APPENDIX

In The United States Court Of Appeals For The Fifth Circuit

No. 88-4535

HORTON AUTOMATICS,

Petitioner
Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent
Cross-Petitioner.

Petition for Review from an Order of the National Labor Relations Board

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 15, 5 Cir., 1989, _F.2d_)

(October 2, 1989)
Before GOLDBERG, REAVLEY,
and JONES, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED

ENTERED FOR THE COURT:

/s/Edith H. Jones 9/27/89
United States Circuit Judge

REHG-6

In The United States Court Of Appeals For The Fifth Circuit

No. 88-4535

HORTON AUTOMATICS,
Petitioner/Cross-Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

On Petition for Review and Cross Application for Enforcement of a Decision and Order of the National Labor Relations Board

(August 15, 1989)

Before GOLDBERG, REAVLEY and JONES, Circuit Judges.*

EDITH H. JONES, Circuit Judge:

During the height of a campaign for union certification, Horton Automatics laid off ten of its employees. The administrative law judge concluded that the layoff violated section 8(a)(3) of the National Labor Relations Act ("the Act"), 29 U.S.C. §158(a)(3), and in addition, that Horton had engaged in ten section 8(a)(1) unfair labor practices, 29 U.S.C. §158(a)(1). A panel of the NLRB affirmed. We enforce the judgment and order.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

BACKGROUND

Although the parties continue to dispute the facts, we are bound by the findings of the Administrative Law Judge ("ALJ") where there is support in the record for them. We will occasionally note where there is a lack of support for a particular finding.[1] In addition, we incorporate certain uncontroverted facts relating to Horton Automatics' ("Horton" or "the Company") business and economic conditions that were not mentioned by the ALJ.

Horton designs and manufactures automatic doors and related products. Most of its products are built to specifications for particular customers. Thus, Horton cannot maintain much finished inventory that it can use to even-out changes in demand. To compensate, Horton tries to maintain a backlog of orders (a lag time between when the order is placed and when the manufacture of that order begins) so that it can schedule its need for supplies, production and manpower.

In the years preceding 1986, Horton's sales grew steadily. Based on its projections for growth in 1986, Horton employed slightly more than 100 hourly workers. This was intended to meet its planned growth of twenty-six percent over the previous year's sales. Horton also expected to grow by that much each of the next two years. In response to these projections, Horton's parent Company, the Dallas Corporation, had approved construction of a new plant that was to be completed in August 1986.

During the early months of 1986, the projected increase in sales was not met. In June, Plant Sales Manager Renaldo Salinas circulated a memorandum to Horton executives detailing these facts and noting a drop in the backlog of orders. While there was a discrepancy in witnesses' estimate of what the ideal backlog would be, it is uncontroverted that a backlog of orders is important to Horton's planning and that the backlog was decreasing. Yet, in June, Salinas was still optimistic that orders would pick up and that Horton would return to its "normal lead time soon."

---

[1] We refer to the findings of the ALJ rather than those of the National Labor Relations Board (NLRB) even though the NLRB adopted the findings of the ALJ in its summary decision. This reference does not alter the standard of review accorded to the NLRB.

Even in June, however, some cuts were instituted to deal with what was hoped to be a temporary shortfall. Market consultants were permanently laid off, and the advertising budget was cut. One-day layoffs were instituted so that production would not continue to outpace new orders. In July, Horton President Lew Hewitt was ordered to meet with Dallas Corporation executives. Hewitt testified that Dallas Corporation Chief Executive Officer Robert Haugh considered his cost cutting plan inadequate. Hewitt testified that Haugh quipped, "If you make your budget, I'll eat my desk."

Summer orders increased, but they never did match those that were projected. Plant Manager Bob Carrier testified that when the backlog of orders further deteriorated in August and September, the production shifted to a "reactive" mode. He testified that in order to keep the manufacturing employees busy orders were filled as soon as they were received, even though this sometimes meant that an order was completed before receipt of the order was confirmed. Supplies sometimes had to be expedited, increasing freight costs. Scheduling was difficult and some production employees were rotated to other departments to keep them busy.

On October 8, 1986, the International Union of Electronics ("IUE") filed an election petition with the NLRB seeking to represent a unit of all hourly production and maintenance employees. On October 9, Horton received notice of the petition and shortly after October 21, Horton received a letter listing the nine members of the "in-plant" Union Organizing Committee. On October 30, the NLRB set the election for December 12, 1986.

On the same day that the NLRB set the election date, Salinas wrote Hewitt another memorandum detailing cuts in production that would have to take place to meet lagging customer orders. The Company contends that in response to worsening economic conditions President Hewitt and Plant Manager Carrier decided to institute a ten percent layoff of production employees. The layoff was implemented by selecting the least senior employees in the effected manufacturing departments. "Bumping rights" were then extended to those who had seniority in other departments. Thus, two employees, including the only member of the in-plant Union Committee on the original list, were replaced. One of those substituted for the union organizer was

Leonard Hoyt, who volunteered to President Hewitt to work against the Union (see discussion in Part II). None of the ten individuals ultimately slated to be laid off were members of the in-plant Union Organizing Committee. The General Counsel and the IUE contend that the layoff was in response to the laid off employees' union activity.

The ALJ neither notes nor discredits the testimony of Horton executives concerning their conversations with the Dallas Corporation about the planned layoff. Hewitt and Carrier testified that they spoke with Alan Bashor, who was Corporate Vice President for Human Resources. Bashor corroborated their testimony, stating that he urged them not to institute the layoff during the organizing campaign. Hewitt testified that he explained the economic need for the layoffs to a senior Dallas company executive who reluctantly approved of his decision.

On November 3 and 4, Hewitt sent two memos to all of the hourly employees informing them of the impending layoff. He noted that the layoff would be instituted according to seniority, as provided in the Company handbook, and explained that "[w]hen work picks up again, employees will be recalled. . ." In response to employee questions, Hewitt asked plant Personnel Director Dan Castillo to hold department meetings and to read a memo with details of the plant's economic condition. On November 7, the ten production employees were notified that they would be laid off effective November 10.

On November 26, the laid off employees were notified that their termination was permanent. Horton claims that because November sales were even lower than anticipated, it became convinced that it would be in the laid off employees' best interest if they were notified that they would not likely be recalled. The General Counsel and the IUE claim that the notification was to prevent the laid off employees from voting in the upcoming election. Nine of the laid off employees attempted to vote in the December 12 election but the Company challenged their votes.[2] At the time of trial Horton had not hired any new temporary or permanent employees to replace the laid off workers.

---

[2] The outcome of the election is still unresolved since the challenged ballots will determine the outcome. In a separate proceeding, the NLRB determined that these ballots will not be counted until the eligibility of the voters is resolved. *Horton Automatics*, 286 NLRB 134, 127 LRRM 1017 (1988).

In addition to the claim that the layoff violated §8(a)(3) of the Act, the IUE also filed ten §8(a)(1) unfair labor practices charges on January 12, 1986. The General Counsel issued its original consolidated complaint on February 20, 1987. Trial was conducted in March and May of 1987. On November 27, 1987, the ALJ ruled against Horton on every claim. The ALJ ordered the laid off employees to be reinstated with back pay and issued a cease and desist order relating to the §8(a)(1) violations. A panel of the NLRB perfunctorily adopted the findings of the ALJ and, with one minor addition, affirmed the ALJ's order. We turn first to the alleged violation of §8(a)(3) Of the Act. We then address each of the individual §8(a)(1) allegations.

I. STANDARD OF REVIEW

Our standard of review is narrow. Findings of the NLRB are conclusive if they are supported by substantial evidence in the record considered as a whole. 29 U.S.C. §160(e); *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488, 71 S.Ct. 456, (1951); *NLRB v. Turner Tool & Joint Rebuilders*, 670 F.2d 637, 640 (5th Cir. 1982). We defer to the trial judge's evaluation of witnesses' demeanor and the resolution of conflicts in testimony. *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1293 (5th Cir. 1980). Yet, we need not defer to credibility resolutions if the credited testimony is "inherently unreasonable or self-contradictory," *NLRB v. Proler,* 635 F.2d 351, 355 (5th Cir. 1981), and as we stated in *Delco Remy Div., General Motors Corp. v. NLRB*, 596 F.2d 1295, 1304 (5th Cir. 1979, we are "'not compelled to respect' credibility choices 'based on inadequate reason or no reason at all.'" (citation omitted).

II. SECTION 8(a)(3) VIOLATION

Section 8(a)(3) makes it an "unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." An employer also violates Section 8(a)(1) when it discharges employees or discriminates in treatment to impair union activity. *Dillingham Marine v. NLRB*, 610 F.2d 319, 321 (5th Cir. 1980).

The ALJ concluded that both the initial decision to layoff the ten employees and the decision to make that layoff permanent violated

the Act. We do not resolve the first issue, although we note the lack of substantial evidence in the record for many of the ALJ's crucial findings. Because we find support in the record for the second of these conclusions, we accept the judgment and order of the ALJ regarding the section 8(a)(3) violation.

A. The November 10 Layoff

Initially, we must consider certain inconsistencies in the testimony of the laid off employees and Union representative that are not mentioned by the ALJ. The ALJ relies heavily on the testimony of employees who claim that they leafletted for the Union prior to their layoff. Since Horton supervisors admitted they observed the leafletting, such testimony is important in showing that the Company knew that the laid off employees engaged in union activity. This, in turn, is essential if the General Counsel is to meet its burden of demonstrating that the layoff was motivated in part by anti-union animus.

The ALJ credits Carreon as testifying that he leafletted "four or five times before the layoff." Davis is credited as having leafletted "six or seven times prior to his layoff." DeLeon is credited as having leafletted "once or twice per week in the mornings and after work" for about four weeks prior to his layoff. The problem with such testimony is that the IUE representative, Jaime Martinez, testified that leafletting occurred on only three occasions prior to the layoff. Martinez was the only person who kept records of the leafletting, and he would have no reason to understate the number of times that leafletting occurred prior to the layoff. None of this is mentioned by the ALJ.

On another important point, however, Jaime Martinez' testimony was directly impeached. He testified on direct examination that his notations of who leafletted (written on fliers admitted into evidence) were made on the days that the fliers were distributed. Based on these notations, he testified that members of the in-plant Organizing Committee and all of the laid off employees participated in the leafletting on October 9, October 21, and October 29. On cross-examination, Company counsel asked him on six occasions when he made the notations. Each time Martinez responded that he made the notations on the day of the leafletting. Then Company counsel asked Martinez why he referred to the "layoff employees" in his notations even though the laid off workers were not notified until November 7.

Martinez was forced to admit that he had really prepared the notations on the day that the unfair labor practice charges were filed.

The ALJ does not mention these or other inconsistencies in the testimony of the witnesses for the General Counsel. Instead, the ALJ relies on "Martinez'[] testimony that all 10 of the laid off employees leafletted at the plant prior to their being laid off." The ALJ does not even mention the uncontroverted testimony of President Hewitt that one of the laid off employees, Leonard Hoyt, approached him and offered to work for the Company to defeat the union. Hoyt's offer is certainly relevant to the claim that the Company knew all ten of the laid off workers engaged in union activity prior to the November 10 layoff. Two other laid off employees did not testify for the General Counsel and not one of the other twelve employee witnesses ever named them as engaging in union activity prior to the layoff.[3]

The ALJ uniformly credits the testimony of the witnesses for the General Counsel and then uses their testimony to discredit otherwise competent testimony of Company supervisors and executives. For example, the ALJ refuses to credit the testimony of Plant Manager Carrier and Supervisor Elizalde that they never saw any of the ten employees leaflet prior to their layoff because some of the laid off employees testified that they did leaflet prior to the layoff. *ALJ Mem. Op.* 28 n.44. That reasoning is unjustifiably broad.

Notwithstanding the ALJ's selective use of the evidence, a few of the laid off workers testified that Company supervisors saw them prior to the layoff wearing union T-shirts, buttons, and visors. Although Horton supervisors dispute this testimony, at least the witnesses for the General Counsel were not contradictory on this point. The ALJ concludes that the evidence of §8(a)(1) unfair labor practices, all but one of which occurred after November 10, shows anti-union animus. The ALJ uses this evidence of knowledge and animus to conclude that such animus was a motivating factor in its initial decision to layoff the ten employees. Even if we were to accept all of the ALJ's factual findings, we might not come to the same legal conclusion regarding the General Counsel's prima facie case.

---

[3] Our review of the record confirms that Roy DeLeon testified that Alonzo Gonzalez, not Franklin Gonzalez, engaged in leafletting prior to the layoff.

Nor would we so quickly reject Horton's economic defense. The ALJ considered it significant that between June and October, during a time of supposed concern over the falling backlog and insufficient sales, Horton hired thirteen new hourly workers. Yet, it is undisputed that these workers were hired to replace employees who had quit, and at most only two of these employees were in the manufacturing departments affected by the layoff. In addition, certain non-manufacturing workers were engaged in the packing, shipping and unloading of equipment into the new plant which opened for production in August 1986. Thus, it was erroneous for the ALJ to attach significance to the hiring of these replacement employees.[4]

The ALJ also dismissed Horton's assertion that the new plant enhanced productivity and lessened the need for employees because "no *conclusive* evidence was presented to support Plant Manager Carrier's assertion" in this regard. (emphasis added) Even without such evidence, it stands to reason that new capital investment would not be made unless it was thought to enhance efficiency in some way.[5]

---

[4] On July 15, 1986, Carrier met with a group of workers to discuss pay and fringe benefits. The ALJ admitted Carrier's contemporaneous memorandum of the meeting "without limitation" as General Counsel's Exhibit 22. One passage of the memorandum, however, contained the following:

> I also told them not to forget how the company has shown [its] appreciation. No major layoffs in the past year. I indicated that one of my first questions to [Personnel Director] Dan [Castillo] when I came on board [in February 1986] was "Why do you have so many people?"

On Carrier's Redirect Examination, Company counsel attempted to rely on this passage, pursuant to Fed.R.Evid. 801(d)(1)(B), to show a prior consistent statement to corroborate and rehabilitate Carrier's earlier testimony that he had told Castillo in February 1986 that the plant was overstaffed. The ALJ refused to consider the evidence or allow the question. The ALJ erred. *United States v. Parry*, 649 F.2d 292 (5th Cir. 1981); *United States v. Albert*, 595 F.2d 283, 289 (5th Cir.), *cert. denied*, 444 U.S. 983 (1979). Since the ALJ discredited Carrier's oral testimony, this error was probably prejudicial.

[5] In addition, the ALJ's calculations of vent production were mistaken because they were apparently derived by dividing the "vent factor" rather than vents produced by the number of days per month. The uncontroverted testimony of Salinas and Carrier demonstrates that the "vent factor" did not correspond directly with the number of vents produced.

The ALJ's most serious omission is that he ignored the uncontroverted evidence of the drop in Horton's profitability from 1985 to 1986. The National Labor Relations Act does not require a company to go into the red before it can layoff workers. A company's profitability is its most important – perhaps its only – measure of success. A manager who does not take reasonable action to address a persistent decline in profitability is neglecting his job and will not last long.

We note these omissions and errors, but we do not devote further attention to this issue because we do not believe Horton could prevail even if it did prove that the initial layoff decision was not motivated by anti-union animus. In short, we find substantial evidence in the record to support the ALJ's findings that the decision to notify the employees that their layoff was permanent was motivated in part by anti-union animus.

B. The November 26 Notice of Permanent Layoff

The Company admits that its supervisors observed certain of the laid off workers leaflet for the Union after the layoff. The Company admits that the layoff became an issue in the election and that it feared that the outcome of the election would be close. It is uncontroverted that Horton had never made permanent layoffs before November 26, 1986. Contrary to Horton's unique decision to effect permanent layoffs at that time, the Company handbook provides that laid off workers are entitled to be recalled for a period equal to their total seniority with the Company or one year, whichever was less. Thus, it was not unreasonable for the ALJ to draw an inference of anti-union animus from the timing of the November 26 notice itself.

The Company asserts that it wanted to inform the laid off employees that they needed to find other health insurance. The ALJ was not persuaded that the notice of permanent layoff was necessary to achieve this objective. The Company also claims that it was told that Franklin Gonzalez was not looking for work because Martinez informed him that he would be recalled to work quickly, and that it decided that the laid off employees should be informed of the likelihood that they would not be recalled. The ALJ, however, credits Martinez as denying that he ever told Gonzalez that he would be recalled quickly.

The ALJ also credited Licon's testimony that Elizalde had told him that the permanently laid off workers would be ineligible to vote in the election. Regardless of whether this was a coercive statement, it is at least proof that the Company was aware that this was one consequence of its decision to send the November 26 notice. Finally, the ALJ relied on the fact that the Company challenged the ballots of the nine laid off employees who did attempt to vote. This reliance was proper because such a challenge strongly suggests that the Company believed that their vote would be unfavorable.

Thus, while the Company's explanation for the November 26 notice might have been properly credited, we find substantial evidence in support of the ALJ's conclusion that a desire to prevent the ten employees from engaging in protected conduct (voting) was a "motivating factor." We do not disturb the ALJ and the NLRB order which awards loss of earnings and benefits from the date of the initial layoff because no alternative was suggested by the Company. Testimony that there had been no one else hired to replace the laid off workers at the time of trial is not enough to warrant a *sua sponte* modification of the remedial order, nor is it even conclusive evidence that the Company would not have recalled some of the workers had the election and subsequent litigation not ensued.

III. SECTION 8(a)(1) VIOLATIONS

Section 8(a)(1) provides that it "shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in section [7] [right to form, join or assist any labor union]." While an employer has a First Amendment right to oppose union organization, it may not use "threat[s] of reprisal or force or promise of benefit" in support of its cause. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 619, 89 S.Ct. 1918, 1942 (1969).

The Supreme Court has contrasted a careful statement "of objective fact [intended] to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already arrived at. . ." with a statement that "an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him. . ." *Id.* Further, we review the employer's speech or conduct from the objective employees' perspective to determine whether they could

"reasonably conclude that the employer is threatening economic reprisals if they support the Union." *TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410, 418 (5th Cir. 1981) (quoting *Hendrix Manuf. Co. v. NLRB*, 321 F.2d 100, 105 (5th Cir. 1963)).

The ALJ ruled against Horton on all ten claims. We examine each allegation in turn to determine whether there is substantial evidence in the record considered as a whole to support the ALJ's findings. We conclude that there is substantial evidence in the record regarding these violations of section 8(a)(1) of the Act.

1. Supervisor Elizalde's Alleged Warning to be Careful.

Union Organizing Committee member Antonio Licon testified that on or about October 31 Supervisor Elizalde told him that he should "be careful because there was a layoff coming around because of union activities." On cross-examination, Licon testified as follows:

> Okay, he walked up to me and told me to be careful because of people who were, he felt, I guess, cause he felt cause of Union activity. Well, he didn't tell me that. He told me in Spanish. And what it boils down to cause of the union.

Elizalde testified that in response to a group of employees' questions regarding a possible layoff, he told them that he did not know about a layoff, but he cautioned them to keep busy because business was slow. The ALJ acknowledged that Licon was nervous and confused but credited his testimony anyway.

We have reviewed the testimony of Licon and Elizalde. We disagree that Elizalde's recollection on the record as a whole, or in regard to this incident, was selective and poor. He testified with few lapses in memory for about 75 pages of transcript, and Licon's testimony on cross-examination casts substantial doubt on what was actually said with regard to union activity and whether Elizalde even mentioned the union. Yet, we must accord the ALJ's evaluation of the witnesses' credibility with deference and we are unable to overturn his determination without making a credibility choice of our own. We therefore accept the portion of the order dealing with this incident.

2. Personnel Director Castillo's Comment Regarding the Layoff.

At a meeting with employees of the door department on November 5, Personnel Director Castillo was asked why Horton could not go to a four-day week, as it had done in the past, instead of laying-off workers. Gonzalez testified that Castillo responded that in the past it was done out of the goodness of his heart, but "remember . . . we are now the bad guys." Supervisor Elizalde corroborates this testimony. President Hewitt testified that Castillo was reprimanded for the comment and was subsequently dismissed.

The Company argues that Castillo meant that the economic conditions of the Company were different now, so that a layoff was unavoidable, even though the employees would not understand because they now considered the Company the "bad guys." The ALJ found that the statement in context did not convey such a meaning; instead, it "conveyed to them the message that the layoff was tied to their union activities." We agree that the statement could be reasonably interpreted as a threat of economic reprisal for their union activity.

3. Elizalde's Comment to DeLeon That He Would Not Be Recalled Because of the Union.

Roy DeLeon testified on direct examination that on the day he received his layoff notice, November 7, he asked Elizalde whether "we were really going to get called back and he said I doubt it. And I said why, and he said union. And turned around, and walked away from me." Elizalde testified that the conversation was substantially different, and denied ever mentioning the word "union." The ALJ credited DeLeon's testimony and found a violation of section 8(a)(1). We agree.[6]

4. The Wash-Up Rule and the Parts Retrieval Restrictions.

The ALJ found that the Company instituted (or enforced for the first time) two new rules designed to restrict employees from speaking

---

[6] We note, however, that DeLeon clarified his testimony on cross-examination. When questioned by Company counsel, DeLeon recounted the conversation differently, stating that the exchange ended with a recommendation from Elizalde that he "should go to unemployment." The following colloquy then took place:

(Continued)

to one another by limiting their access to each other. The first rule provided that the employees could not "wash-up" until the break or lunch bell rang rather than a few minutes before the bell. The second rule provided for a new position of "parts runner" so that other employees would not wander around the plant.

An employer has a right to enforce reasonable rules regarding employee conduct, but an employer may not restrict "employees' right to discuss self-organization among themselves, unless the employer can demonstrate that a restriction is necessary to maintain production or discipline." *NLRB v. Babcock & Wilson Co.*, 351 U.S. 105, 113, 76 S.Ct. 679, 684 (1956); *Turner Tool*, 670 F.2d at 641. The Company asserts that both rules existed prior to the union campaign and that the "wash-up" rule was only enforced in the door department because of the complaint of employees in another department. The rules themselves are not in question; it is the enforcement of these rules during the union campaign and the alleged abandonment of them thereafter that raises a question of improper motive.

Moreover, there is even more direct evidence of an improper motive. Supervisor Elizalde testified that he was instructed to keep his employees at their work stations and "to keep them from wandering around and talking too much about the Union." Such testimony,

---

(Continued)

> Q. . . . Th[en] at some point in time he turned his back and said union. Are you denying that now?
>
> A. He said union, and then walked away.
>
> Q. So that's what he said. And that was in response to what?
>
> A. I have no idea. I was wearing my buttons and my hat and my visor at that time.
>
> Q. Well, was he making a comment on your visor and your hat, or what was it?
>
> A. I think he was like saying, union, just union. You're in the union, I guess.
>
> JUDGE CATES: I'll permit him to tell what was said. But what conclusions he drew f[rom] it, I'm not interested.
>
> A. I don't know what he meant by it.

Although DeLeon's interpretation is certainly probative of the context and sequence of the conversation, we are still unable to overturn the ALJ's credibility determination.

coupled with evidence of the timing of the rules enforcement, provides substantial evidence of the violation as found by the ALJ.

5. Elizalde's Alleged Comments About Who Could Vote in the Up Coming Election.

On or about December 1, Elizalde was alleged to have approached Licon and informed him that "the people who were laid off . . . were permanently laid off and would be ineligible to vote" in the December 12 election. Elizalde said that Licon asked him if the laid off employees could vote and he replied that he did not know. Licon testified that Elizalde approached him and told him that the laid off employees "were terminated, and . . . would be ineligible to vote *because of their union activities.*" (emphasis added) The ALJ credits Licon's testimony even though the ALJ acknowledged that "Licon was somewhat confused about certain details." We are unable to upset the ALJ's credibility determination. We therefore accept his ruling with respect to this incident.

6. Carrier's Comments Regarding Champion's Wage Review.

Horton concedes in its brief that on or about December 10, 1986, Carrier approached Champion and asked him if he was pleased with his wage review. Champion stated that he was happy with his raise. Carrier then stated, "I'm glad you got a good one because if you guys vote the wrong way we won't have this any more." The Company argues that the comment is taken out of context. The ALJ concluded that the remarks constituted an unlawful threat that there would not be any future wage increases if the employees voted for the Union. We agree. *See NLRB v. Brookwood Furniture,* 701 F.2d 452, 459-60 (5th Cir. 1983).

7. The Confrontation Between President Hewitt and IUE Representative Martinez on December 10.

Although the testimony regarding certain details is hotly contested, certain facts are undisputed. President Lew Hewitt was distressed because of Union leaflets that depicted him as a liar and as a wolf in sheep's clothing. Lew Hewitt announced at a plant meeting that he would confront Martinez about the fliers after work. That afternoon, Lew Hewitt confronted Martinez and asked him: "Are you

going to call me a liar to my face?" Martinez either did not answer or began to chant Union slogans to the crowd that gathered around the two men. Lew Hewitt's son, Engineering Manager David Hewitt, then approached within a few inches of Martinez' face and shouted for him to "Answer the Man." According to Union witnesses, David Hewitt then pushed Martinez, some said with his hands, some said with his chest. Company witnesses denied David Hewitt touched Martinez. The ALJ believed the Union witnesses.

The ALJ found that the assault violated the Act "where onlookers would likely infer from the assault that the employer would also retaliate in the same fashion against any employee who supported the union." Without necessarily agreeing with the ALJ's theory that employees would reasonably fear for their physical safety, we agree that such an incident could have a potentially coercive effect upon the employees. *See J.P. Stevens v. NLRB,* 441 F.2d 514, 518-19 (5th Cir. 1971). David and Lew Hewitt precipitated the incident, and although several other supervisors were present, none of them intervened to prevent the "assault".

During the course of the confrontation, laid off worker Abe Herrera supposedly yelled that Plant Manager Carrier's daughter, who was in the crowd, should have been laid off before him and that the laid off workers "would get their jobs back with justice." According to three Union witnesses, Plant Manager Carrier either responded that the laid off employees were not coming back to work or that Herrera was not coming back to work. Five Company witnesses testified that they never heard Carrier respond to Herrera. Carrier testified that he did not hear Herrera's comments. Herrera did not testify but this is not mentioned by the ALJ.

The ALJ discredited Carrier with the odd reasoning that any similarly situated supervisor would have responded as Carrier is alleged to have responded and would thus violate the Act. While we do not agree with this analysis, we are bound by the ALJ's acceptance of the testimony of the Union witnesses. Thus, the statement attributed to Carrier could be considered a threat that an employee or employees would not be recalled for engaging in protected activity. The statement violates section 8(a)(1).

8. Plant Manager Carrier's Questioning of Employee Lewis.

The day before the election, December 11, Kendell Lewis claims that "Bob [Carrier] asked me if I had decided which way I was going to vote on the elections. *** I told him I hadn't." Carrier did not recall the conversation but claims that he knew Lewis was a Union supporter from a Union decal on his toolbox. The ALJ credited Lewis' testimony and found that the questioning was coercive.

Initially, we note that the ALJ failed to apply the *Bourne* factors to determine whether the conversation in light of the total circumstances was an unlawful interrogation. *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). *See Fiber Glass Sys., Inc., v. NLRB*, 807 F.2d 461, 463 (5th Cir. 1987) (vacating and remanding decision for failure to apply the *Bourne* criteria).[7] In *Fiber Glass*, we stated:

> Both the ALJ and the Board failed to apply these factors and failed to articulate the bases for its section 8(a)(1) findings. Although this court has repeatedly directed the NLRB to apply the *Bourne* factors, the Board has shown continued reluctance to set forth its legal bases for finding employer questioning coercive or threatening under section 8(a)(1).

Id. (citations omitted). A remand is not necessary in this case, however, since the record is sufficiently complete to apply the *Bourne* factors on review. *Id.* at 463 n.3. The other section 8(a)(1) violations are evidence of the employer's unfavorable attitude toward its employees. Carrier's rank placed him in a position of authority over Lewis. The type of information sought went to the heart of Lewis' union sympathies and served no valid purpose in the company's

---

[7] The *Bourne* factors include:

> (1) the history of the employer's attitude toward its employees; (2) the type of information sought or related; (3) the company rank of the questioner; (4) the place and manner of the conversation; (5) the truthfulness of the employee's response; (6) whether the employer had a valid purpose in obtaining the information; (7) if so, whether this purpose was communicated to the employee; and (8) whether the employer assures that no reprisals will be taken if they support the union.

Fiber Glass, 807 F.2d at 463.

operations. Carrier offered no assurances that no reprisals would be taken if Lewis supported the union. Perhaps that is why his answer was less than complete or candid.

It is true that Lewis referred to Carrier by his first name and admitted on cross-examination that conversations with him were common. *Compare NLRB v. Fuller Super Markets, Inc.*, 374 F.2d 197, 203 (5th Cir. 1967) (no pattern of inquiry and informality of the relationship made it unreasonable to infer that the remark carried with it an implied threat of reprisal) *with TRW-United*, 637 F.2d at 417 ("repeated efforts by the employer to determine who supports the union, coupled with employer opposition to the union, may be considered as background when determining whether a conversation tends to be coercive"). Yet, the totality of the circumstances suggest that the conversation was coercive. We defer to the judgment of the ALJ and the NLRB.

9. President Hewitt's January 14, 1987 Comments.

President Hewitt called a plant meeting on January 14, 1987 to discuss the election results and unfair labor practice charges filed by the union. He asked who had supplied information to the Union which formed the basis of the complaint. He then asked "was that you Gordon [Klitzke]." Klitzke said that he had not. The Company claims that Hewitt intended merely to inform the employees of the filing of the charges as that would further delay the certification of the election, and that his question to Klitzke was rhetorical since everyone knew that he was not involved. The ALJ concluded that the Act was violated by the interrogation of all the employees and also violated with respect to employee Klitzke.

President Hewitt also made a statement regarding solicitation of employees to sign dues deduction cards. Licon testified that he "didn't want people signing up people on Company property." Hewitt testified that he said that it was up to the employees, but that he did not think it was proper to ask employees to sign dues deduction cards since the Union had not yet been certified. The ALJ credited Licon and found a violation of the Act.

Later that day, Hewitt called Union organizers Licon and Vasquez into his office for a meeting with Carrier. Licon and Vasquez testified that Hewitt asked them if they were the ones supplying

information to the Union. They responded that they were not. Licon also claims Hewitt told them not to solicit dues deduction card signatures on Company property.[8] Vasquez claims he told Hewitt that he would stop so as not to harm anyone.

Hewitt and Carrier testified that Hewitt informed Licon and Vasquez that they had received complaints from an employee that he was being pressured to sign a dues deduction card. After Licon and Vasquez admitted that they had been involved in the solicitation, Hewitt testified he told them:

> I may be wrong, but it is my opinion that until the union is certified, that it's not proper to ask employees to sign the cards. After it is certified that's fine, but until it is certified, I don't think it is proper.

Hewitt and Carrier said that the two employees replied that they had already decided not to solicit signatures anymore. The ALJ credited Licon's and Vasquez' version and found a violation of the Act.

Although the ALJ did not expressly apply the *Bourne* factors in its discussion, the analysis does encompass a sufficient number of them to satisfy our review. The ALJ's findings are supported by evidence in the record and we therefore accept its rulings regarding these events.

10. Elizalde's Comments about Contract Negotiations.

The amended complaint asserts that the incident took place on or about December 1, 1986. Licon testified that in early March, 1987, (less than two months prior to his testimony before the ALJ) he was discussing how long it would take to negotiate a contract with a group of workers when Elizalde approached them. Elizalde allegedly told them it would take at least two years for the Company and Union to negotiate a contract, and then all the company would have to do is change its name or relocate its facility. Licon said that that ended the discussion. Licon's version of the incident was not corroborated by

---

[8] Vasquez testified Hewitt said "he preferred that we stop because the Union hadn't been recognized." Thus, Licon is the only witness present who claims Hewitt prohibited solicitation on Company property. Yet, his version is credited by the ALJ.

witnesses who were supposedly present and who testified for the General Counsel.

Elizalde testified that Licon approached him and asked if it was true that it would take two years for the Union to come in. Elizalde said that he did not know. According to Elizalde, Licon then asked if all the Company had to do was change its name or move to avoid the Union. Elizalde said he did not know anything about that. Elizalde said that Licon then moved on because he was carrying a heavy object. The Company argues that it would be highly improbable for Elizalde to walk up to Licon and make the statement attributed to him.

The ALJ discredits Elizalde because he was not "an impressive or credible witness" and credits Licon who was supposed to have made "a conscientious effort to tell the truth to the best of his recollection." The ALJ found a violation of the Act because the statement conveyed the message to the employees that it was futile for them to select the Union as their bargaining representative. Since we are bound by the ALJ's credibility decision, we accept his finding of the violation.

For the foregoing reasons, we *ENFORCE* the order of the NLRB.

United States Of America
Before The National Labor Relations Board

HORTON AUTOMATICS
and
INTERNATIONAL UNION OF ELECTRONICS,
ELECTRICAL, TECHNICAL, SALARIED AND
MACHINE WORKERS, AFL – CIO,
DISTRICT 11

Cases 23 – CA – 10594
23 – CA – 10595

DECISION AND ORDER

On November 27, 1987, Administrative Law Judge William N. Cates issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions and to adopt the recommended Order, as modified.[3]

---

[1] The Respondent excepted to the judge's failure to admit G.C. Exh. 22, the notes of Plant Manager Carrier, as evidence of a prior consistent statement to corroborate Carrier's testimony that since he began working at the Company, he had expressed his view to then Plant Superintendent Castillo, among others, that the plant was overstaffed. We find it unnecessary to pass on this exception to the judge's evidentiary ruling because, even if admitted, the evidence would not affect the outcome in this case.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge inadvertently omitted the cease-and-desist paragraph in the recommended Order. Accordingly, we shall modify the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Horton Automatics, Corpus Christi, Texas, its officers, agents, successors, and assigns, shall take the action set forth in the order as modified.

Insert the following as paragraph l(n).

"(n) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

Dated, Washington, D.C. June 28, 1988

Wilford W. Johansen, Member

Marshall B. Babson, Member

Mary Miller Cracraft, Member

NATIONAL LABOR
RELATIONS BOARD

(SEAL)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

HORTON AUTOMATICS
and
INTERNATIONAL UNION OF ELECTRONICS, ELECTRICAL, TECHNICAL, SALARIED AND MACHINE WORKERS, AFL- CIO, DISTRICT 11

Cases 23-CA-10594
23-CA-10595

Tamara J. Gant, Esq., for the General Counsel.

Jaime P. Martinez, International Representative, of San Antonio, TX for the Union.

Gary L. Lieber, Esq., and Karen Ann Broe, Esq. on brief only (Porter, Wright, Morris & Arthur), of Washington, DC, for the Company.

DECISION

Statement of the Case

WILLIAM N. CATES, Administrative Law Judge:

I heard this matter on 23 and 24 April and 27 and 28 May 1987 at Corpus Christi, Texas. The cases arose when International Union of Electronics, Electrical, Technical, Salaried and Machine Workers, AFL-CIO, District 11 (Union), filed unfair labor practice charges against Horton Automatics (Company), on 12 January 1987. Acting on behalf of the Board's General Counsel the Regional Director for Region 23, investigated the charges and issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing (Complaint) on 20 February 1987. The complaint was amended on 17 March 1987 and at trial herein. The Company answered admitting many background and jurisdictional contentions made in the complaint but denied all claimed wrongdoings.

The General Counsel makes extensive claims in the complaint. It is claimed that the Company starting as early as October 1986[1] engaged in various conduct prohibited by Section 8(a)(1) of the Act.[2]

It is also alleged that the Company violated Section 8(a)(3) of the Act, by on or about 10 November laying off 10 of its employees and thereafter on 26 November discharging them.[3]

All parties were given full opportunity to participate, introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs filed by the Company and Counsel for the General Counsel have been carefully considered.

I conclude below, after examining the relevant evidence and applicable legal principles, that the Company violated the Act substantially as alleged in the complaint.

Findings of Fact

I. JURISDICTION

The Company is a division of Overhead Door Company which is a wholly owned subsidiary of The Dallas Corporation, which is and has been at all times material herein, an Indiana Corporation, with an office and place of business located in Corpus Christi, Texas, where it is engaged in the manufacture of glass and automatic doors. During the calendar year preceding the issuance of the complaint herein, a representative period, the Company in the course and conduct of its Corpus Christi, Texas operations purchased and received goods and materials valued in excess of $50,000 directly from points outside the state of Texas. During the same time period the Company derived gross revenues in excess of $500,000 from its Corpus Christi, Texas operations. Further, during the same time period the Company sold and shipped from its Corpus Christi, Texas facility goods and materials valued in excess of $50,000 directly to customers located outside the state of Texas. The parties admit and I find the Company is, and at all times material herein has been, an employer engaged in

---

[1] All dates hereinafter are 1986 unless otherwise indicated.

[2] The specific 8(a)(1) allegations are fully set forth elsewhere in this Decision.

[3] A list of the employees that were laid off is set forth elsewhere in this Decision.

commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The parties admit and I find the Union is, and at all times materials herein has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

In attempting to establish, or defend against, the claims set forth in the complaint, the parties called some 21 witnesses and presented numerous documents. The testimony and responses thereto are set forth below, essentially in the order established by the complaint with the exception that I have attempted to address all Section 8(a)(1) allegations before addressing the Section 8(a)(3) allegations.

Inasmuch as credibility is a material issue in the instant case, I deem it appropriate to make some preliminary comments thereon. In deciding which of the conflicting versions of events is more credible I have given considerable weight to the demeanor of the witnesses while they were on the stand. I have considered each witnesses' testimony in conjunction with established or admitted facts, inherent probabilities, and reasonable inferences which may be drawn from the record as a whole. With respect to the testimony I have borne in mind the tendency of witnesses in general to testify as to their impressions or interpretations of what was said or done, rather than attempting to give a verbatim account of what they heard, saw, or did. Further, I am not unmindful that even in the case of persons testifying about their own remarks or actions, they may well tend to express what they said or intended to say in clearer or more explicit language than they actually used in their discussions or conversations. As to any witness having testified in contradiction of the findings herein, their testimony has been discredited either as having been in conflict with the testimony of credible witnesses or because it was in and of itself unworthy of belief. All testimony has been reviewed and carefully weighed in light of the entire record. As specific credibility conflicts arise I will state more specifically my reasons for crediting or discrediting any particular witness on any particular portion of their testimony.

A. Background and Undisputed Facts

It is admitted that President Lew Hewitt (Hewitt), Plant Manager Robert Carrier (Carrier), Plant Superintendent David Castillo (Castillo), Supervisor Jose Elizadle (Elizadle), Supervisor Hank Howski (Howski), Supervisor Antonio Cruz (Cruz), Supervisor Gerald McKane (McKane), and Sales Manager Renaldo Salinas (Salinas) are and were at all times material herein supervisors and agents of the Company within the meaning of Section 2(11) and (13) of the Act.[4]

It is acknowledged that at all times material herein: Allen Bashor (Bashor) was vice president of Human Resources for The Dallas Corporation, David Hewitt (D. Hewitt) was Engineering Manager for the Company, and Jeff Williamson (Williamson) was Division Comptroller for the Company. It is likewise undisputed that Christine Aloquin (Aloquin) is the daughter of Plant Manager Carrier and Jamie P. Martinez (Martinez) is and at all times material herein has been an international representative of the Union.

It is undisputed that President Hewitt was notified by the Union on 9 October that it wished to organize the employees at the Company. On 21 October the Union provided the Company a list of those serving on its Employee Voluntary Organizing Committee.

In a memorandum dated 3 November, President Hewitt notified all employees at the Company that a layoff was imminent and that the Company would follow its handbook with respect to layoff and recall procedures. In a memorandum dated 4 November, President Hewitt advised all employees that 10 of them had been specifically selected for and would be temporarily laid off effective 10 November. The 10 employees temporarily laid off on that date were: Rene Carreon (Carreon), Jon Eric Davis (Davis), Roy DeLeon (DeLeon), Carlos Garcia (C. Garcia), Joe Garcia (J. Garcia), Franklin Gonzalez Jr., (Gonzalez), Rolando Gutierrez (Gutierrez), Abe Herrera (Herrera), Manuel Mendez (Mendez), and Leonard S. Hoyt (Hoyt). On 26 November President Hewitt notified each of the laid off employees in writing that they were permanently laid off, as of that date.

On 12 December the Board, in Case 23-RC-5318, conducted an election by secret ballot among the employees of the Company. All of

---

[4] Superintendent Castillo was terminated on or about 15 January 1987.

the laid off employees except Hoyt, who did not vote, were challenged by the Company at the election on the basis they were permanently laid off with no reasonable expectancy of recall.

B. The Section 8(a)(1) Allegations

1. Supervisor Elizadle's Alleged Comments Regarding the Rumor of a Layoff

It is alleged at paragraph 11 of the complaint that on or about 31 October Supervisor Elizadle told an employee that he and other employees should be careful because the Company was planning to lay off employees because of the Union and activities engaged in by employees in support of the Union.

Voluntary Organizing Committee member Antonio Licon (Licon), a fabricator in the header department under Supervisor Elizadle, openly demonstrated his support for the Union by, among other things, wearing a union button and t-shirt at work. Licon testified Elizadle told him in Spanish at his work station that he should "be careful because there was a layoff coming around because of union activities". Licon placed the conversation somewhere between the time the Union notified the Company on 21 October of the existence of its Voluntary Organizing Committee and the 10 November layoff.[5]

Licon said he had not heard any rumors about a pending layoff prior to the time Elizadle spoke to him about an upcoming layoff.

Supervisor Elizadle testified that approximately 2-weeks before the November layoff some employees who were gathered in the framing area asked him if there was going to be a layoff. Elizadle told them as far as he was concerned it was just a rumor but if a layoff did occur he would be the second person to know about it and they would be the next ones to know. Elizadle said he cautioned the employees to keep busy because business was slow. Elizadle remembered there were approximately six or seven employees present in the group but he did not state if one of them was Licon.

I credit Licon's testimony as outlined above. I am persuaded his apparent and admitted nervousness while testifying was as a result of

---

[5] Licon was somewhat confused as to when Elizadle talked to him and somewhat uncertain or confused with respect to whether anyone else was present during the conversation.

his anxiety about having to testify and not as a result of any willful attempt on his part to misstate the facts. Likewise, his confusion as to dates and whether others were present appeared to have been honest and not caused by any deliberate intent on his part to fabricate facts. Some of Licon's confusion while testifying appeared to have resulted from the fact the conversation he was testifying about had been in Spanish and he was attempting to testify about it in English.[6] On the other hand, Elizadle was not an impressive witness. His recollection on cross-examination was selective and poor.[7]

I find Elizadle's statement in late October or early November that a layoff was coming because of the employees' union activities constituted an unlawful threat of layoff in violation of Section 8(a)(1) of the Act.

2. Supervisor Elizadle's Alleged Comments Regarding Recall of the Laid Off Employees

It is alleged at paragraph 12 of the complaint that on or about 7 November Supervisor Elizadle informed DeLeon that (a) he [Elizadle] doubted DeLeon and the other employees would be recalled in accordance with the Company's handbook as to layoffs and recalls, as in prior years, and (b) the employees would not be recalled in accordance with the Company's handbook as to layoffs and recalls, as in prior years, because of the Union.

DeLeon an active supporter of the Union[8] worked, from November 1985 until he was laid off in November 1986, for his friend, Supervisor Elizadle.[9] DeLeon testified Elizadle told he and J. Garcia[10]

[6] Licon stated that approximately 80 percent of the workforce spoke Spanish.

[7] For example, when Counsel for the General Counsel asked Elizadle about a conversation he admitted having with Supervisor McKane in 1986 he could not recall what month it took place in and even suggested to Counsel for the General Counsel that she "pick [her own] month" as to when it occurred.

[8] DeLeon commenced his union activities in October. He thereafter handbilled at the plant approximately once or twice a week for 4 to 6 weeks and he also wore union hats, buttons, and t-shirts at work.

[9] DeLeon stated he considered Elizadle a friend and that Elizadle coached the softball team he was on. He said Elizadle had visited in his home and had even visited him when he was in the hospital. DeLeon on one occasion sold Elizadle a pet.

[10] DeLeon acknowledged on cross-examination that there was no mentioned made in his pretrial Board affidavit about J. Garcia having been present for the conversation

(Continued)

on 8 November that they were going to be laid off on 10 November. DeLeon stated he asked why and Elizadle told them the layoff was not up to him and he had not made out the list of those slated for layoff. Elizadle stated the list had been prepared by Plant Manager Carrier. According to DeLeon he asked if he could be transferred to the shipping and receiving department. Elizadle told him no, that he was going to get someone else to do DeLeon's job. DeLeon then asked if Plant Manager Carrier's daughter was going to be laid off because he had more seniority than she did. Elizadle responded that DeLeon knew very well Plant Manager Carrier's daughter would not be laid off. DeLeon asked Elizadle if any thing could be done, or if any thing could be worked out about the layoff. Elizadle told him he was sorry he had not made the list out and had not wanted to lay him off. DeLeon asked Elizadle:

> . . . if we were really going to get called back and he said I doubt it. And I said why, and he said union. And turned around, and walked away from me.

DeLeon stated he was wearing a union hat, button, and sun visor at the time.

Supervisor Elizadle testified he had a conversation with DeLeon on the Friday DeLeon received notification he was going to be laid off effective 10 November. The notification of layoff was in his paycheck envelope. Elizadle testified DeLeon was "pissed off" and said to him:

> . . . hey Joe, what the fuck man, what is this shit, you know... am I going to be laid off a day, a year, what the fuck man...

Elizadle further testified:

> I told him as far as I'm concerned it's just the way the memo states. It's just a temporary layoff. Business picks up I'm pretty sure they'll call you back.

Elizadle asserts at that point he left the area where DeLeon was.

Elizadle first testified he could not recall if any mention was made about the Union or union activities during the conversation.

(Continued)

Although called as a witness by Counsel for the General Counsel, J. Garcia was not questioned about nor did he mention being present at any conversation between Elizadle, DeLeon, and himself.

However, when pressed further by company counsel he dutifully stated the Union was not mentioned.

I credit DeLeon's above outlined testimony. Elizadle's demeanor and the full record convinces me he was not fully candid in his recall of this conversation.

An employer violates Section 8(a)(1) of the Act when it tells employees, as I find Elizadle did, that they will not be recalled from layoff because of their union activities. Compare: *United Beef Co., Inc.*, 277 NLRB 1014 at 1027 (1985)

3. The Alleged Comments of Superintendent Castillo Regarding the Layoff

It is alleged at paragraph 13 of the complaint that on or about 5 November Superintendent Castillo informed an employee that the scheduled layoff of 10 November, unlike prior layoffs, would include employees of the Company whom it considered to be "bad ones."[11]

Voluntary Organizing Committee member Alonzo Gonzalez (A. Gonzalez) testified that on 5 November Supervisor Elizadle read a paper to his employees about declining sales and the pending layoff. Superintendent Castillo was also present at the time. Gonzalez testified some of the employees asked why the Company could not, as it had done in the past, go to a 4-day work week and thus avoid a layoff. According to Gonzalez, Castillo responded they had done that in the past out of the goodness of their hearts but for them to "remember. . . we are now the bad guys" Gonzalez testified the conversation ended after Castillo's remarks.[12]

Supervisor Elizadle acknowledge reading a memorandum to the fabrication and door assembly employees on 5 November about the pending layoff. He stated that after he read the memorandum the employees asked Superintendent Castillo "if it was possible for them to. . . scatter the days [off] like they [had done] in the . . . past". Elizadle

---

[11] I note the language of this paragraph of the complaint does not conform to the findings I have made on this allegation, however, the matter was fully litigated.

[12] Voluntary Organizing Committee member John Champion corroborated Gonzalez's testimony as outlined above. Champion stated Castillo did not specifically mention the Union when he made his comments.

asserts Castillo replied, "last year it was done by the goodness of his heart, that we're the bad guys remember.[13]

The evidence is very conclusive and I find Superintendent Castillo not only told the fabrication and assembly employees that he had allowed the layoffs to be scattered over a number of days last time out of the goodness of his heart, but that he also told them this time the Company was the bad guys.

The critical question is whether his comments violated the Act. Viewed in context, I find they did. The Union's campaign was active at the time. Supervisor Elizadle had a few days earlier told employees a layoff was coming because of the employees union activities. Prior to the advent of the Union there had been at least one layoff that had been accomplished by employees taking days off spread over a period of time. When Castillo told the employees this past practice with respect to layoffs could not be followed because the Company was the "bad guys" he clearly conveyed to them the message that the layoff was tied to their union activities.[14]

4. The Wash-up Rule and the Parts Retrieval Restrictions

It is alleged at paragraph 16 of the complaint that on or about 17 November Supervisor McKane informed employees working in the Machine Shop that effective that date, they could no longer wash up before breaks or lunch or at the end of the work day, as they had in the past.

Employees at the Company are daily given 15 minutes in the morning, 30 minutes at lunch, and 10 minutes in the afternoon for breaks. All employees take their breaks at the same time. Bells signal the beginning and ending of all break times. Machinist Kendall Lewis (Lewis) testified that at least from May 1984 until November 1986 the employees, with Company knowledge, stopped work two to three minutes before their break times to go to the restrooms and clean up.

---

[13] Castillo recalled telling the employees he had done it in the past out of the goodness of his heart but he contends he added the situation was different this time around. Castillo could not recall referring to himself or the Company as the bad ones.

[14] The coerciveness of Castillo's comments was not lessened by the fact he made them in response to questions from the employees or that he did not use the word "union" in his comments.

Lewis stated Supervisor McKane, Superintendent Castillo, and Plant Manager Carrier had observed this practice without saying anything to the employees prior to November 1986. Lewis testified that on 17 November he observed:

> Jerry McKane start on the north end of the machine shop and approaching individuals, talking to each one of them for a minute or so. And when he got to the milling area he called the people that were working on the mills, and the people that were running the saws, [Xavier Cisneros, Tony Barrera, Genero Perez, Ron Russel, and Lewis] together. And told us that we would no longer be able to wash our hands before the break bell rang.

According to Lewis, McKane did not mention the Union when he announced the restrictions. Lewis stated that "a few weeks" after the 12 December Board conducted election was held, McKane told the employees they could wash their hands before quitting time but the restrictions on cleaning up before break and lunch times would continue.

Supervisor Elizadle testified the Company had a written rule that employees were only allowed five minutes "washup" time before the end of each work shift.[15] He, however, said he had never enforced the rule with any of his 30 or so employees. Elizadle said Foreman McKane complained to him in November about his allowing the employees under his supervision to "washup" five minutes before the noon break. According to Elizadle, McKane said his [McKane's] employees were complaining to him about the disparate enforcement of the rule. Elizadle said he thereafter met with the employees under his supervision and reminded them of the rule. He stated he told them he wanted them to start washing up at noon not five minutes before that time, however, he added he never enforced the rule and still does not pay much attention to whether it is adhered to or not.

It is alleged at paragraph 22(a) of the complaint that on or about 23 October Supervisor Elizadle informed employees that they would no longer be permitted to leave the department to secure parts in other plant departments.

---

[15] No such written rule was produced at the trial herein.

Licon testified Supervisor Elizadle told the employees in his department, right after the Union notified the Company of the existence of its Voluntary Organizing Committee,[16] that they could no longer leave the department to get parts or for any other reason. Elizadle told the employees he had assigned one employee (Davis) to "run parts" and "deliver headers".

Supervisor Elizadle testified that around the first of November he was instructed by Plant Manager Carrier and Superintendent Castillo to keep his employees at their work stations in order "to keep them from wandering around and talking to much about the Union."[17] Elizadle stated he told the employees under his supervision that they were to remain at their work stations and if they needed anything to have Davis get it for them. Elizadle stated Davis was assigned the newly created parts runner position approximately a month to six weeks before he was laid off. Elizadle stated Davis was required to perform his normal fabricator duties when he was not involved in running parts. Elizadle acknowledged the Company had never previous to the time in question had a parts runner position in his department. He further acknowledged the position was eliminated after Davis and the others were laid off on 10 November. Elizadle asserts the parts runner position was created in order to keep Davis busy and was eliminated when he no longer had a surplus of employees in his department.

The Company contends that since both the washup rule and parts runner position dealt solely with employees work time not their break or lunch times its enforcement of these rules, restrictions, and assignments was lawful. I reject the Company's contentions.

First I note the Act does not prevent an employer, such as the company herein, from making and enforcing reasonable rules addressing employees conduct during work time. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1949). However, the Board in *Brigadier Industries Corporation*, 271 NLRB 656 at 657 (1984), held:

---

[16] The union's letter notifying the Company of the existence and makeup of its Voluntary Organizing Committee was mailed to the Company on 21 October.

[17] Elizadle stated that when he talked to his employees about wandering around the plant he did not say anything to them regarding what they could do on their lunch and break times.

> When faced with a union organizing campaign an employer may not for *union* reasons promulgate a no-solicitation and/or no-distribution rule or *place other restrictions on employees*. Nonetheless, during the union campaign, an employer maintains a legitimate interest in preserving production and discipline. When an employer adopts a rule during a union campaign, it does not automatically follow that the rule is invalid. If the employer has acted for legitimate business interest - rather than for union reasons - its promulgation of a rule cannot be deemed unlawful [emphasis added footnotes omitted].

The Board's principle that otherwise valid rules or restrictions violate the Act when such are promulgated to interfere with employees' rights to self organization rather than to maintain production and discipline have been upheld by the Courts. See for example, *Harry M. Stevens, Inc., a/k/a Harry M. Stevens, Inc.*, 277 NLRB 276 enfd. 793 F.2d 1288 (5th Cir. 1986) and *Hunter Douglas, Inc.*, 277 NLRB 1179 at 1185 (1985) enfd. 804 F.2d 808 (3rd Cir. 1986) . In the instant case the Company's rule (if in fact one existed) against washing up before break, lunch, and quitting times had not been enforced prior to the advent of the Union.[18] The rule, as announced and enforced by Foreman McKane, took effect in the midst of the Union's campaign and was, in part, rescinded after the Board conducted election was held. In light of these facts, I am persuaded, in agreement with Counsel for the General Counsel, that the rule was announced and for a period of time thereafter enforced, at least by Supervisor McKane, for the purpose of limiting the time employees would have off the work floor for discussing union matters. There is no showing that the long practice of allowing employees to wash up before all breaks had suddenly become a disciplinary or production problem for the Company. Accordingly, I find the Company's purpose in promulgating (or suddenly enforcing) the rule in question was to interfere with its employees' right to self-organization and as such violated Section 8(a)(1) of the Act.

---

[18] Employee Lewis credibly and without contradiction testified Foreman McKane, Superintendent Castillo, and Plant Manager Carrier had observed that practice and had not said anything about it.

With respect to the newly created parts runner position I find the evidence is overwhelming the Company was unlawfully motivated in establishing such a position. First, the parts runner position was created immediately after the Company received notification of the creation and composition of the Union's Voluntary Organizing Committee. Secondly, the parts runner position was specifically intended to keep employees from "talking too much about the Union." Thirdly, there is no conclusive evidence that production or discipline was suffering as a result of employees talking while they worked. Fourthly, the position was abolished after the 10 November layoffs took place. The timing of the creation of the parts runner position coupled with its stated purpose and in the absence of evidence of any disciplinary or production problems compels a finding that the rule against employees leaving their work stations was discriminatorily motivated in that it was intended to prevent employees from discussing the Union.

Accordingly, I find the Company's newly established rule of restricting its employees to their work stations by utilizing a parts runner position was motivated by the purpose of interfering with its employees right to self-organization in violation of Section 8(a)(1) of the Act.

5. The Confrontation Between President Hewitt and International Union Representative Martinez and Plant Manager Carriers' Comments

It is alleged at paragraph 17 of the complaint that on or about 10 December, 2-days prior to the election scheduled to be conducted in Case 23-RC-5318, outside of the plant, while employees were engaged in handbilling activities on their own time, and in the presence of the employees laid off and discharged and other employees, President Hewitt and Plant Manager Carrier in the presence of Company agent Roy Blankenship and President Hewitt's sons David and Daniel Hewitt confronted International Union Representative Martinez whereby: (a) President Hewitt asked Martinez if he was going to call him (Hewitt) a liar to his face. (b) International Union Martinez stated that the handbilling was nonviolent and employees had Section 7 rights to solicit and distribute literature outside the Company's property. (c) Either David or Daniel Hewitt pushed Martinez and yelled at

him to "Answer the man." and (d) As Martinez was walking away, Plant Manager Carrier told the laid-off employees that he would see to it that they would never work for the Company again.

International Union Representative Martinez testified that starting in October he and various employees of the Company handbilled at the plant entrances on several occasions. Martinez stated that on one such occasion, which took place on 10 December, and at a time when approximately 30 to 40 employees were present,[19] President Hewitt came from the plant "yelling" for "Jamie Martinez."[20] Martinez identified himself as an international union representative and as the person President Hewitt was "yelling" for. Martinez testified Hewitt asked "in a very loud voice", "Are you going to call me a liar to my face?"[21] Martinez testified he spoke to the employees that were present and told them "We're with the union and we've got a right to solicit", "We're non-violent", "We've got a right to be here and solicit". According to Martinez, President Hewitt's son, Engineering Manager D. Hewitt, pushed him into the street using the palms of his hands and his chest. Martinez stated that as Engineering Manager D. Hewitt was pushing him into the street he was "yelling" into his ear "spitting" in his face and instructing him to "Answer the man". Martinez asserts he was pushed from the sidewalk across a curb into the street.[22]

---

[19] Martinez estimated there were 50 employees present after others came from the plant at quitting time on that date.

[20] President Hewitt was accompanied by his sons David and Daniel Hewitt, Plant Manager Carrier, Supervisors Elizadle, McKane, Cruz, and others.

[21] Martinez explained the background to President Hewitt's question as follows. Martinez said he had filed charges with the Board against the Company and that President Hewitt had on 3 December informed the employees in writing the charges would delay the election scheduled for 12 December. Martinez testified he put out a handbill on 5 December informing the employees the election would be held as scheduled and that President Hewitt's information to the contrary was "a lie."

[22] Vasquez, J. Garcia, and Davis corroborated in essential parts Martinez's testimony as outlined above. Vasquez did add that traffic was approaching on the street at the time Engineering Manager D. Hewitt pushed Martinez into the street. Vasquez asserts, contrary to Martinez, that Martinez told President Hewitt he did not call him a liar. I am persuaded on this latter point that Vasquez was mistaken. However, I do not find this to impact on the credibility resolutions I have made herein. Furthermore, J. Garcia testified he did not hear President Hewitt talk at all but stated

(Continued)

President Hewitt testified the Union had circulated two handbills among the employees in December one of which implied he was a liar and the other that he was a hypocrite. Hewitt stated the leaflets were, in his opinion, extremely unfair and untrue and caused him a great deal of personal distress. President Hewitt said he met with employees of various departments at the plant on 10 December. He stated that in those meetings at which members of the Union's Voluntary Organizing Committee were present he told them he had had enough insinuations he was a liar and a hypocrite. He told the Voluntary Organizing Committee members that if they knew how to get in touch with International Union Representative Martinez they should do so, because he was "going to confront him that afternoon." President Hewitt stated that as the day wore on he became "more determined" to have a confrontation with Martinez and set the matter straight between them. Hewitt said he did not know if anyone actually got word to Martinez, but that Martinez was just off Company property handbilling that afternoon. President Hewitt testified he walked up to Martinez and asked him who he was. He stated Martinez identified himself and he asked Martinez if he had gotten his message. Martinez said he had not. Hewitt then told Martinez, "[Y]ou've been saying that I've been lying, and that's not true, and I want you to apologize for it". Hewitt stated Martinez looked at him for a while and then began to say something about employee rights and so forth. Hewitt testified he asked "again and again" "probably more loudly" if Martinez had called him a liar. He said Martinez would not answer him. President Hewitt testified his oldest son, Engineering Manager D. Hewitt, got within an inch or two of Martinez and repeatedly told Martinez to "Answer the man". Martinez would not respond. President Hewitt said he then reached out and touched his son David and told him "We're not going to get an answer, let's go." President Hewitt said they then returned to his office. According to President Hewitt the entire confrontation lasted approximately 5 to 10 minutes. Hewitt denied anyone touched Martinez.

Several supervisors testified regarding what they observed and heard during the confrontation. Supervisor Howski testified the con-

---

(Continued)

David Hewitt came up to [Martinez] and yelled in his ear, shoving him away" and told him "to get off the premises." Again I do not find these minor variations regarding what took place on 10 December to detract from the truthfulness of Martinez account of what took place.

frontation "got pretty loud and nasty". Howski testified Engineering Manager D. Hewitt stood "face to face... not more than an inch away" from Martinez, but he did not see him push Martinez. Supervisor Cruz testified President Hewitt was red in the face, speaking loudly, and visibly upset. He also said Engineering Manager D. Hewitt was very upset at Martinez. Crus, however, stated he was not close enough to the confrontation to see if any touching took place between the participants. Supervisor Elizadle stated President Hewitt and Engineering Manager D. Hewitt were both "yelling" at Martinez; however, he added that because he (Elizadle) was short of stature he was unable to see if the Hewitts touched Martinez. Vice President of Human Resources for The Dallas Corporation Bashor testified "they were not speaking in a civil tone" and "the emotions were increasing", but he asserts neither of the Hewitts struck or touched Martinez.

Certain facts are beyond dispute. The confrontation was deliberate and preplanned by President Hewitt. He even challenged employees who supported the Union to get the word to Martinez, that he wanted a confrontation that afternoon. A high level representative of the parent company did nothing to discourage or prevent the confrontation from taking place, because as The Dallas Corporation Vice President of Human Resources Bashor stated "Lew [Hewitt] felt strongly about it". The challenge for the confrontation and the confrontation was known to and took place in front of numerous rank-and-file employees. President Hewitt and Engineering Manager D. Hewitt approached Martinez in an angry, loud, and emotionally charged manner.

It is in light of this background that I consider whether Engineering Manager D. Hewitt physically assaulted Martinez. I find he did. Martinez's testimony that D. Hewitt assaulted him was corroborated by employees Vasquez and J. Garcia. Furthermore it is very probable that in the emotionally charged confrontation D. Hewitt assaulted Martinez. Engineering Manager D. Hewitt, although still employed by the Company, did not testify, nor was his failure to do so explained in any way. Hence, the one additional person, on the part of the Company, who could have spoken with first hand knowledge of the account, chose, for whatever reason, to remain silent.[23]

---

[23] His silence is important only with respect to resolving this credibility issue.

An employer violates Section 8(a)(1) of the Act, by assaulting a union representative when it does so in the presence of one or more employees under circumstances where on lookers would likely infer from the assault that the employer would also retaliate in the same fashion against any employee who supported the union. *Batavia Nursing Inn*, 275 NLRB 886 at fn. 2 and at 891 (1985).

In the case sub judice, I find the employees could reasonably have believed that such a fate might befall them as had befallen the Union's international representative if they supported the Union. The reason announced to the employees for the confrontation grew out of the Union's campaign literature. The actual assault took place at a time when the Union's international representative was telling the employees they had a legal right to organize in a non-violent manner. Thus, I find the Company violated Section 8(a)(1) of the Act when its Engineering Manager D. Hewitt assaulted the Union's representative in the presence of employees of the Company.

Martinez testified that one of the leaflets they were attempting to distribute on 10 December pertained to unemployment compensation payments for the laid off employees.

Vasquez testified Herrera was one of those handbilling on 10 December and that he had copies of two unemployment checks which he showed Plant Manager Carrier. Davis testified that at that same time Plant Manager Carrier's daughter was telling International Union Representative Martinez to answer President Hewitt's questions about whether he had called him a liar. According to Davis, Herrera said Carrier's daughter did not have the right to say anything because she did not have any seniority and should have been one of the first to have been laid off. J. Garcia stated Herrera told Plant Manager Carrier that the laid off employees would get their jobs back and with justice. According to J. Garcia, Plant Manager Carrier answered that the laid off employees were not coming back to work.[24]

[24] Vasquez, Davis, and International Representative Martinez corroborated, although in slightly different ways, the essential aspects of J. Garcia's above testimony. Vasquez for example, stated Plant Manager Carrier said the laid off employees would not be coming back to work as long as he was around. Davis stated Carrier said Herrera would never come back to work at the Company again. International Union Representative Martinez testified Plant Manager Carrier said the laid off employees would not be coming back to work that he would see to it they did not. Herrera did not testify nor was his absence explained in any manner.

Plant Manager Carrier testified he did not have a conversation with Herrera on 10 December, but he said he heard Herrera make some comment about his daughter who was standing next to him at the time. Carrier testified he did not hear anyone say any words to the effect that certain of the employees would never work at the Company again.[25]

Simply stated I find unbelievable the testimony that Plant Manager Carrier stood by at this highly charged confrontation and said nothing. I find this highly unlikely especially considering the fact his daughter was actively participating in the verbal part of the confrontation and was at the same time being accused of receiving preferential treatment because she was Carrier's daughter. I credit Counsel for the General Counsel's witnesses regarding the incident. I do not find the minor differences in their testimony to detract from the overall accuracy of their testimony.

I find the Company through Plant Manager Carrier violated Section 8(a)(1) of the Act, when he threatened that the laid off employees would not be considered for recall by the Company because he would see to it.

6. President Hewitt's 14 January Comments

It is alleged at paragraph 18 of the complaint that on or about 14 January, President Hewitt (a) Asked employees if they were giving information to International Union Representative Martinez regarding the unfair labor practice charges filed by the Union in Cases 23-CA-10594, 10595, and 10596; (b) Told employees, when they did not respond, that he (Hewitt) had heard that the Union was having employees sign checkoff cards on Company property and that this had to stop; (c) Stated to employees that even, if they were signing up employees for checkoff authorizations during their breaks, they could

[25] President Hewitt testified he never heard any official of the Company say he would see to it the laid off employees never worked for the Company again. The Dallas Corporation Vice President of Human Resources Bashor testified he did not hear Plant Manager Carrier say anything during the confrontation. Supervisor Elizadle said he did not hear Carrier say anything at the confrontation but added he was giving his attention to the "yelling" that was going on at the time. Supervisor Howski testified he did not even know if Carrier was present or not at the confrontation. Supervisor Cruz could not recall what if anything Carrier might have said at the confrontation but he believed Carrier did not say anything.

not do it at any time and that the election was "over with"; and (d) Told employees that he (Hewitt) wanted to know of any future activities any of the employees engaged in on behalf of the Union.

It is undisputed that President Hewitt spoke to all employees and supervisors at a meeting held in the quality control room at the plant on 14 January 1987. President Hewitt said he called the meeting to bring the employees up to date on the status of the Board-conducted election and to talk about foreign competition. According to Licon and Vasquez, Hewitt stated there had been unfair labor practice charges filed against the Company and he wanted to know who was responsible for giving the information to the Union upon which the charges were based. Licon and Vasquez stated President Hewitt specifically asked employee Gordon Klitzke if he was the one who had given the information to the Union. Klitzke denied doing so.[26]

Licon credible testified President Hewitt also said he had heard rumors that employees were trying to get dues checkoff cards signed at the plant, and he did not want anyone signing employees up on Company property and to please stop doing so.[27]

After observing Hewitt, Licon and Vasquez testify and weighing their testimony in light of admissions made by Hewitt I credit Licon's and Vasquez' s version of the 14 January 1987 general employee meeting.

I find President Hewitt violated Section 8(a)(1) of the Act when he asked all the assembled employees who among them had been

---

[26] President Hewitt acknowledged discussing certain unfair labor practice charges with the employees but stated he did so in the context of telling the employees that if the charges against the Company did not stop they would never get the Board-conducted election resolved. Hewitt also acknowledged asking Klitzke if he was the one who had supplied the information to the Union on which it based its charges against the Company. He added however that he knew "beyond question that he [Klitzke] would not be the one who was making charges against us".

[27] Vasquez corroborated Licon's above-outlined testimony. President Hewitt acknowledged discussing dues checkoff cards with the assembled employees. He said he told the employees he had been getting complaints that they were trying to get others to sign dues checkoff cards. He also said he told the employees he did not think it was proper for them to ask others to sign dues checkoff cards because the Union had not been certified. He asserts he told the employees it was their privilege to sign or refuse to sign such cards.

giving information to the Union that formed the basis for the Union's charges against the Company. The totality of the circumstances dictates such a finding. See: *Rossmore House*, 269 NLRB 1176 (194) enfd. 760 F.2d 1006 (9th Cir. 1985). The questioning was done by the highest official of the Company. The question asked was not rhetorical but rather was calculated to invoke a response from the employees that would reveal their union sympathies at a mandatory meeting of employees. Further, President Hewitt also violated Section 8(a)(1) of the Act, when he specifically singled out employee Klitzke and asked him if he was the one who had been supplying the information in question to the Union. Other than Hewitt's assertion that he knew Klitzke's had not been supplying information to the Union, there is no evidence to indicate Klitzke had expressed his views, one way or the other, on the Union prior to that time. Furthermore, Klitzke was interrogated in front of all of his fellow workers and for no valid or justifiable reason. I also find President Hewitt's statement to the assembled employees that he did not want them to solicit union dues checkoff cards on Company property and to stop doing so violated the Act. In this regard, I note such a broad prohibition would clearly restrict employees from soliciting for the Union during their nonworking time on Company premises.

It is undisputed that after the above-described meeting took place President Hewitt and Plant Manager Carrier met with Licon and Vasquez in Hewitt's office. Licon testified President Hewitt asked them if they were the ones that had been giving unfair labor practice charge related information to International Union Representative Martinez. Licon told Hewitt they had not given any such information to Martinez. According to Licon, President Hewitt said "if there was any further union activities going on that he would like to be notified, instead of being caught off [guard] . . . with rumors and stuff". Vasquez testified President Hewitt also asked if they were the ones who had been soliciting employees to sign dues checkoff cards. Vasquez told Hewitt he had been. Hewitt asked when he had done so. Vasquez told Hewitt, "I'm doing it on my own time which is before work, breaks, lunch, and after work". Vasquez testified President Hewitt told him he preferred they stop soliciting because the Union had not been recognized by the Company. Vasquez protested saying he had been doing it on his own time. Hewitt responded "but you're still on

[C]ompany property". Vasquez told Hewitt he would stop because he did not want to do anything that would harm anyone.

President Hewitt acknowledged he and Plant Manager Carrier met with Licon and Vasquez on the day in question. Hewitt said a complaint from an employee that Licon and Vasquez had constantly been after the employee to sign a union dues deduction card prompted the meeting. Hewitt acknowledged he asked Licon and Vasquez if they had been soliciting for the Union and he asserts they admitted they had. Hewitt said he told them:

> I may be wrong, but it is my opinion that until the [U]nion is certified, that it's not proper to ask employees to sign the cards. After it is certified that's fine, but until it is certified, I don't think it is proper.

According to Hewitt, Licon responded they had already decided not to solicit anymore. Hewitt testified he then told them "I think out of courtesy to us that you should tell us when you are planning to do that again." Hewitt said they indicated they would do so.[28]

That a meeting between the two employees and two management officials took place after the general meeting on 14 January 1987 is not disputed nor is there any dispute with respect to the subject matters discussed. To the extent that there are differences between the employees' and managers' versions of what was said at the meeting I credit the employees' account. I credit the employees' account because it is clear from the record as a whole that President Hewitt was determined to find out who had provided charge related information to the Union and who had been soliciting dues deduction cards on Company property. Not only did he attempt to ascertain this type of information from the employees at the general meeting but he had also directed at that general meeting that all card signing activities cease on Company property. In light of his earlier actions it is quite logical and very probable that he said exactly what Licon and Vasquez attribute to him. Furthermore, President Hewitt impressed me as a very determined individual who would do or say whatever he perceived to be in his, or the Company's, best interest without full regard for the consequences of his actions.

[28] Plant Manager Carrier, in pertinent part, corroborated Hewitt's testimony as outlined above.

I find President Hewitt's questioning known union supporters Licon and Vasquez was, under all the circumstances herein, coercive and as such violated Section 8(a)(1) of the Act. First, the questioning took place after but on the same day Hewitt had unlawfully interrogated the entire assembled workforce about the same subject matter. Secondly, the questioning took place in President Hewitt's office and in the presence of Plant Manager Carrier. Thirdly, President Hewitt had already, at a group meeting, attempted to ascertain who had provided the information in question to the Union and after being unsuccessful there moved on to questioning Licon and Vasquez in the privacy of his office in his attempt to find out what he wanted to know.

I also find President Hewitt violated the Act by telling Licon and Vasquez he did not want them to solicit their fellow workers to sign dues deduction cards on Company property, especially in light of the fact Vasquez told Hewitt he had only done so during nonworking times.

7. Elizadle's Alleged Comments about who could vote in the Board-Conducted Election

It is alleged at paragraph 19 of the complaint that Supervisor Elizadle on or about 1 December informed employees that Plant Manager Carrier had informed him (Elizadle) that since the employees that were laid off were now permanently discharged they could not vote in the election on 12 December in Case 23-RC-5318.

Licon testified that on or about 1 December Supervisor Elizadle approached him while he was alone[29] in his work area and told him the 10 laid off employees were terminated and would be ineligible to vote in the election because of their union activities.

Supervisor Elizadle, after some difficulty in recalling an early December conversation with Licon about the layoffs, acknowledged such took place. However, he stated Licon asked him if the laid off employees could vote in the Board-conducted election. He said he told Licon he did not know.

As is noted elsewhere in this Decision Licon was somewhat confused about certain details in his testimony; however, I am per-

---

[29] On cross-examination Licon stated Vasquez could have been present when Elizadle talked to him but he could not be certain.

suaded his confusion was honest and not an attempt to misstate facts. I credit his testimony regarding his early December conversation with Elizadle. I note Supervisor Elizadle had told Licon back in October that he should be careful that a layoff was coming because of the Union. Furthermore, Elizadle had told employee DeLeon in early November that he doubted the laid off employees would be recalled because of the Union. It is therefore logical and probable that he told Licon the laid off employees had been terminated and would not be eligible to vote in the election because of their union activities.[30]

Elizadle's statement was clearly coercive and in violation of Section 8(a)(1) of the Act, in that it conveyed a message to the employees that the Company's latest action against the laid off employees was taken because of their union activities and to preclude them from voting in the Board conducted election.

8. Elizadle's Alleged Comments about Negotiations

It is alleged at paragraph 22(c) of the complaint that Supervisor Elizadle on or about 1 December told an employee that it would take at least 2 years before they would reach an agreement on a contract and to cause further delay all the Company had to do was relocate or change its name in order to do away with the Union.

Licon testified that on 6 March 1987 he and fellow employees Vasquez and Lopez were discussing how long it would take to negotiate a contract when Supervisor Elizadle approached them.[31] Licon testified Supervisor Elizadle told them it would take at least 2 years for the Company and Union to negotiate a contract, and even if they did the Company could delay it further by changing its name or relocating its facility. According to Licon, Elizadle also told them such action on the part of the Company would do away with the Union. Licon stated that after Supervisor Elizadle finished talking they more or less ended their discussion because they did not want to antagonize Elizadle.

---

[30] I noted there had been discussions at the Company among some of the managers on this subject. Superintendent Castillo testified Plant Manager Carrier told him that because the laid off employees had been permanently laid off they would not be able to vote in the Board-conducted election.

[31] Licon assumed Elizadle overheard what they were discussing.

Supervisor Elizadle stated he had a 2 to 3 minute conversation about the Union with Licon in March 1987. According to Elizadle, Licon asked if it was true that it would take 2 years or something like that for the Union to come in. Elizadle said he told Licon he did not know. Licon then told Elizadle he had heard if the Union came in all the Company had to do was change its name or move to avoid the Union. Elizadle said he told Licon he did not know anything about that. Elizadle stated that ended their conversation because Licon was walking along with a heavy item at the time.

As is more fully explained elsewhere in this Decision, I did not find Elizadle to be an impressive or credible witness. Licon on the other hand appeared to be making a conscientious effort to tell the truth to the best of his recollection. Accordingly, I credit Licon's account of his March conversation with Elizadle as set forth above.

Supervisor Elizadle's March 1987 statement to Licon and others, was coercive and violated Section 8(a)(1) of the Act, in that it conveyed the message to the employees that it was futile for them to select the Union as their bargaining representative. See e.g. *Thriftway Supermarket*, 276 NRLB 1450 at 1460 (1985) enfd. 808 F.2d 835 (4th Cir. 1986).

9. Plant Manager Carrier's Alleged Comments on an Employee's Wage Review

It is alleged at paragraph 22(d) of the complaint that Plant Manager Carrier on or about 10 December solicited an employee's comment on his recent wage review and threatened that employee that, if the employees voted for the Union the raise would be rescinded.

Voluntary Organizing Committee member John Champion testified he was given a review for a wage increase on 9 December and the next day (10 December) Plant Manager Carrier asked him about it. He said the two of them were alone at the time. Champion testified Carrier asked him if he had been given his wage review. Champion told Carrier he had. Carrier asked if it was a good one and Champion responded he had no complaints that he had gotten a raise. According to Champion, Plant Manager Carrier said, "I'm glad you got a good one, because if you guys vote the wrong way we won't have this any more".

Plant Manager Carrier testified Champion told him at the beginning of December he felt he had been skipped over when the other employees had been given wage reviews in November. Carrier checked into the matter and found Champion had in fact been skipped over. Carrier testified he instructed Champion's supervisor to review him for a wage increase. Carrier stated he later followed up on the matter by asking Champion if he had been reviewed, and if he was happy and satisfied. Carrier stated Champion indicated he was satisfied. Carrier stated the Union was not mentioned in their conversations.

I am persuaded Plant Manager Carrier made the comments Champion attributes to him. The record evidence as a whole supports such a finding in that Plant Manager Carrier had a keen interest in the out come of the union election. His keen interest led him to engaged in conduct that violated the Act. He for example, stated at the confrontation between President Hewitt and International Union Representative Martinez that the laid off employees would not be recalled because he would see to it. As is discussed below he asked employee Lewis the day before the election how he was going to vote in the election. Although not found to be unlawful, he told Plant Superintendent Castillo the laid off employees were permanently laid off and would not be able to vote. Although I have found Carrier's comments to have violated the Act, I do not find his remarks constituted a threat to rescind the wage increase involved but rather to constitute an unlawful threat that there would not be any future wage increases if the employees voted the wrong way in the Board-conducted election.

10. Plant Manager Carrier's Alleged Questioning of Employee Lewis

It is alleged at paragraph 22(e) of the complaint that Plant Manager Carrier on or about 11 December interrogated an employee concerning how he planned to vote in the upcoming election.

Employee Kendall Lewis testified that on 11 December as he was alone walking from lunch[32] in the sheet metal fabrication area Plant Manager Carrier approached and asked him if he had decided which way he was going to vote in the election. Lewis told Carrier he had not decided. Lewis said that prior to Plant Manager Carrier's

[32] Lewis testified that on lots of occasions Plant Manager Carrier would talk to employees during their lunch breaks.

talking with him he had not in any way demonstrated his preference either for or against the Union.

Plant Manager Carrier testified he could not recall having a conversation in December with Lewis about the Union. He stated he knew however, by December that Lewis supported the Union by his "mannerisms" and by the fact he had a union decal on his toolbox.

I credit Lewis' testimony as set forth above. I note Plant Manager Carrier was unable to deny the conversation. In crediting Lewis' testimony I note he had not expressed his views about the Union prior to Plant Manager Carrier's questioning him on 11 December. I find, under all the circumstances, that Carrier's questioning of Lewis was coercive. See: *Rossmore House*, supra. Lewis had not made his union sympathies known at the time Carrier questioned him and the question specifically sought Lewis' personal sympathies about the Union. Plant Manager Carrier was a high level management official who did not directly supervise Lewis and the questioning took place one day before the election for no valid or justifiable reason. Accordingly, I find the Company violated Section 8(a)(1) of the Act by coercively interrogating Lewis. See: *H.S.M. Machine Works, Inc., and Cove Aircraft Products, Inc.*, 284 NLRB No. 136 (1987).

C. The Temporary and Permanent Layoff of 10 Employees

It is alleged at paragraph 14 of the complaint and admitted by the Company in its answer, that on 10 November it laid off its employees Carreon, Davis, DeLeon, C. Garcia, J. Garcia, Gonzalez, Gutierrez, Herrera, Mendez, and Hoyt. It is further alleged at paragraph 15 of the complaint that on or about 26 November the Company permanently discharged the above named employees. The Company acknowledges the above employees were notified in writing, on that date, that they were permanently laid off.

Inasmuch as there is no dispute with respect to the fact the employees in question were laid off, first on a temporary and then later on a permanent basis, I shall examine the motives behind and the alleged necessity for the layoffs. In doing so, I shall examine the union activities of the laid off employees, whether the Company knew of those activities, and whether those activities played any part in the Company's decision to have a layoff. Finally, I shall examine the

Company's contention the layoffs were brought about by economic necessity.

1. Events Leading up to the Employees' Union Activities at the Company

Licon credibly testified he and approximately 15 other employees met after work at Chiquita Park in Corpus Christi, Texas, in late June to discuss problems they perceived existed at the Company. They discussed wages, sick leave, supervision, and other related matters. Licon testified they also decided to attempt to arrange a meeting with President Hewitt or Plant Manager Carrier to discuss their problems. He said they also decided to contact a union for assistance.

Licon stated that the next day the same 15 employees met with Plant Manager Carrier and Supervisor Elizadle. Licon testified Carrier told the group the Company was trying to put together a plan for an across-the-board wage increase for all employees, and promised to look into their other concerns. However, Plant Manager Carrier told them:

> [T]his was America, this was a free country, and if we didn't like it there was the door. There was other opportunities you know, other places. That times were hard for the company to increase our pay rates.

Licon stated he thereafter on 16 July contacted International Union Representative Martinez via telephone and arranged to meet with him later that afternoon at a local motel. They discussed the various departments at the plant and some of the problems the employees were experiencing.[33] Licon stated little else was accomplished at the meeting with Martinez, however, in early October he and others started to solicit employees to sign union authorization cards. According to Licon a Union Voluntary Organizing Committee was established and the Company was notified in writing on 21 October of the existence of the Union's in-plant committee. The letter of notification sent to the Company listed nine Voluntary Organizing

---

[33] Others present at the meeting were Janie Garcia (Licon's sister-in-law who is the president of Union Local 1029) and Josie Vela (a friend of Licon's).

Committee members.[34] Inasmuch as none of those on the Voluntary Organizing Committee were laid off, I shall carefully examine the union activities of those who were laid off and attempt to ascertain if the Company was aware of any such activities on their part.

2. The Union Activities of the Laid Off Employees

Carreon testified he wore a "Yes IUE" button at work three to four times per week starting in mid-October. He stated his immediate supervisor Elizadle saw him wearing the prounion buttons. Carreon testified he handbilled for the Union at the plant four or five times before the layoff. He testified he saw Davis and Gutierrez leafleting prior to the layoff. Carreon stated Plant Manager Carrier observed them leafleting each time they did so.

Davis testified he became involved with the Union shortly after he was hired and wore a union t-shirt to work two or three times during the two weeks before his layoff. He stated his supervisor, Elizadle, saw him four or five times and Plant Manager Carrier a couple of times each time he wore his pro-union t-shirt. Davis also said he wore IUE buttons and leafleted in the parking lot, or inside the plant during break times, six or seven times prior to his layoff.

DeLeon testified he commenced wearing union t-shirts, hats, and buttons in mid-October and did so almost every day until he was laid off. He stated he leafleted at the plant once or twice per week in the mornings and after work from approximately early October until he was laid off. DeLeon stated Gonzalez, among others, leafleted with him prior to the layoff. He stated Supervisor Elizadle observed them each time they leafleted and Plant Manager Carrier saw them almost every time they leafleted.

J. Garcia testified he wore pro-union buttons daily and pro-union sun visors and t-shirts at work every other day starting in late October. He stated he was observed by his supervisor, Elizadle, daily and by Plant Manager Carrier just about every day that he wore the union related items. J. Garcia testified he, Gutierrez, Davis, Gonzalez, and

---

[34] None of the nine listed on the letter were among those laid off on 10 November.

others leafleted at the plant starting in late October.[35] He said Plant Manager Carrier observed them each time they leafleted.

Gutierrez testified he wore a union t-shirt or union button three times per week for approximately 4-weeks before he was laid off. He stated Plant Manager Carrier, Superintendent Castillo and Supervisor Elizadle saw him wearing the union related items. Gutierrez testified he, along with Mendez, J. Garcia, Carreon, and Herrera, leafleted outside the plant prior to the November layoff. He asserts Plant Manager Carrier observed them doing so.

Mendez testified he wore a union t-shirt approximately twice and union buttons four or five times at work starting in the second week in October.[36] He stated his immediate supervisor Cruz as well as Plant Manager Carrier observed him wearing the union related items. Mendez testified he as well as Carreon, Gutierrez, and others leafleted at the entrance to the plant parking lot prior to the layoff. He stated they were observed doing so by Plant Manager Carrier.

Vasquez testified he wore a union button just about every day starting around 9 October and a union t-shirt twice a week commencing at about that same time. Vasquez stated President Hewitt and Plant Manager Carrier observed him doing so. Vasquez testified he and other employees leafletted at the plant from mid-October until December. He stated *all* the laid off employees, including Hoyt, leafleted prior to and after they were laid off.

A. Gonzalez testified that he and others including Carreon, J. Garcia, DeLeon and Gutierrez leafleted at the plant several times prior to the 10 November layoff. A. Gonzalez stated Plant Manager Carrier or Supervisor Howski always observed them with Carrier doing so more often than Howski.

Champion testified he and others including J. Garcia leafleted at the plant prior to the layoff. Champion stated that "most of the time" Plant Manager Carrier observed the leafleting.

---

[35] He said he leafleted six or seven times before the layoff.

[36] He said the t-shirts had "IUE a Great Union" on them and the Union buttons read "Vote Yes" or "Proud To Be IUE."

3. Company Knowledge of the Union Activities of the Laid Off Employees

Supervisor Howski, who did not supervise any of the laid off employees,[37] testified he never saw any of those who were laid off wearing or displaying any union related items, such as t-shirts, buttons, hats, or stickers. Howski acknowledged leafleting took place before the employees were laid off, but he asserted he never saw any of those who were laid off, that he knew, participating in the leafleting prior to the layoff.[38]

Supervisor Cruz testified that two of the laid off employees, Hoyt and Mendez, worked under his supervision. Cruz stated Hoyt never did anything that indicated to him that Hoyt favored the Union. He, however, stated he believed from things Mendez said that he favored the Union. Cruz observed employees wearing union t-shirts at the plant, but he could not recall if it was before or after the layoff took place. Cruz testified he knew certain of the laid off employees by sight only, and that of those he knew by sight only, he never observed them leafleting at the plant. Cruz however, acknowledged on cross-examination that he could not describe what laid off employees Carreon, Davis, DeLeon, Gonzalez, Gutierrez, or Herrera looked like. Cruz further acknowledged on cross-examination that on the days when there was leafleting he only observed it for approximately 1 minute or less as he was on his way to his car in the parking lot.

Elizalde testified he supervised seven[39] of the laid off employees and he said he never saw any of them[40] leafleting prior to the November layoff. He said he saw Herrera, Davis, and J. Garcia handbilling after they were laid off. He testified the first time he saw

---

[37] Howski testified Mendez was on loan to his department prior to the layoff. He said he saw Mendez leafleting at the plant but that it was after the layoff.

[38] Howski said he saw Mendez, Davis, and Herrera leafleting after they and the others were laid off. He acknowledged he could not describe what the other seven employees looked like that were laid off.

[39] He supervised Carreon, J. Garcia, Gonzalez, Davis, DeLeon, Herrera, and Gutierrez.

[40] He acknowledged on cross-examination he never stood around and observed the handbilling when it took place except for the 2 or 3 minutes it took him to walk from the plant to his car after work.

employees wearing union t-shirts was around Thanksgiving after the layoffs had taken place.[41] Elizalde stated he had seen union buttons and stickers in the plant prior to the layoff.

Plant Manager Carrier stated he positioned himself so as to be able to observe the leafleting every time it occurred at the plant. He said the leafleting first started sometime between 9 and 22 October and that International Union Representative Martinez along with some employees on the Voluntary Organizing Committee leafleted once or twice a week before the layoff and sometimes as much as three times per week after the layoff.[42] When asked by Company counsel if he knew in early November the position of the laid off employees with respect to whether they were for or against the Union, Carrier answered, "I don't know . . . I would say no. No, I didn't know."

It is without dispute the Company knew of the Union's presence at its facility from 9 October forward.[43] The Company was notified in writing on or about 21 October which of its employees were on the Union's Voluntary Organizing Committee. Further, it is undisputed the Union engaged in leafleting activities at the entrances to the plant on various occasions starting in October. There is dispute with respect to the critical question of whether the employees that were laid off engaged in any union activities prior to their being laid off, and whether the Company was aware of any such activities on their part.

The overwhelming weight of the evidence persuades me that each of the 10 laid off employees engaged in activities on behalf of the Union, prior to their being laid off, and that the Company knew of their activities. Vasquez testified, and I credit his testimony, that all 10 of the laid off employees leafleted at the plant prior to their being laid off. I note, Plant Manager Carrier observed all leafleting.[44]

---

[41] He stated he observed J. Garcia and Herrera wearing them at that time.

[42] Carrier stated the first time he saw any employee leafleting that was not on the Voluntary Organizing Committee was after the layoff.

[43] President Hewitt, for example, testified he received correspondence on that date relating to a petition for the Union.

[44] In light of all the record evidence I am unwilling to credit Plant Manager Carrier's testimony that the first time he saw any non-Voluntary Organizing Committee employees leafleting was after the employees had been laid off. I likewise do not credit Supervisor Elizadle's testimony that he never saw any of the 10 employees who were laid off leafleting prior to their being laid off.

International Union Representative Martinez corroborated Vasquez's testimony that all 10 of the laid off employees leafleted at the plant prior to their being laid off. Carreon, Davis, DeLeon, J. Garcia, Gutierrez, Mendez, A. Gonzalez, Champion, and Licon collectively corroborated Vasquez's testimony by identifying the same 10 individuals in the process of leafleting at one time or other prior to the layoff.[45] While it is conceivable that all 11 of the above witnesses called by Counsel for the General Counsel contrived their testimony or were mistaken regarding what they testified about, however, that is highly unlikely. As noted in *Fred Stark*, 213 NLRB 209 at 214 (1974), the likelihood of perjury or mistake becomes more remote in direct or geometrical proportion to the number of persons who testify to a fact. Further evidence of the Company's knowledge of the union activities of its laid off employees is demonstrated by the fact Carreon wore a union button two to three times a week starting in October and Supervisor Elizadle observed him doing so. Davis wore union buttons and t-shirts and Elizadle also observed him doing so. DeLeon wore union buttons, t-shirts, and hats until the layoff. J. Garcia wore union buttons daily and union t-shirts and sun visors every other day and was observed by Supervisor Elizadle daily and Plant Manager Carrier almost every day. Gutierrez wore a union t-shirt or union button three times per week during the 4 weeks before he was laid off and Plant Manager Carrier observed him doing so. Mendez wore a union t-shirt twice before being laid off and union buttons approximately five times in mid-October. The buttons Mendez wore read "Vote Yes" "Proud To Be IUE" and the t-shirts he wore read, "IUE a Great Union." I note Mendez's testimony comports with International Union Representative Martinez's testimony that he distributed union t-shirts, buttons, and related items to the employees in the second week of October with the words "Proud To Be IUE" on some of them.

Hostility for and knowledge of the laid off employees organizing activities is further demonstrated by various of the unfair labor prac-

---

[45] I place no reliance on or give any weight to Supervisor Howski's and Supervisor Cruz's testimony that they did not observe any of the laid off employees leafleting prior to their being laid off. None of the laid off employees worked for Howski and he was unable to give a description of seven of the 10 that were laid off. Cruz only observed the leafleting for one minute or less on those days when there was leafleting and he could not describe six of the 10 laid off employees.

tices the Company engaged in prior to the 10 November layoff. The Company, immediately after it received word of the existence of the Voluntary Organizing Committee, created a parts runner position in Supervisor Elizadle's department for the purpose of interfering with its employees right to self-organization by keeping them from "talking too much about the Union." Supervisor Elizadle told Licon, in late October or early November, that a layoff was coming at the plant because of the employees union activities. Superintendent Castillo conveyed to the fabrication and assembly department employees the clear impression that the 10 November layoff was tied to their union activities when he, in the presence of Supervisor Elizadle, told them the Company would not follow it past practice of laying the employees off for one day a week over a period of time inasmuch as the Company was now the "bad guys." On 8 November Supervisor Elizadle told DeLeon and J. Garcia he doubted they would be recalled from layoff because of the employees union activities.

4. Counsel for the General Counsel's prima facie case

Considering all the facts thus far discussed, I am convinced, as urged by Counsel for the General Counsel, that the Company was motivated, in part, to have a layoff by its hostility for and animus toward the organizing activities of its employees.

Additionally, there is substantial post layoff evidence of the Company's animus toward the organizing activities of its employees. Such evidence further demonstrates the 10 November layoff was, at least in part, motivated by anti-union considerations.

For example, the Company through Supervisor McKane announced in November, and for a time during the union campaign and following the Board-conducted election, enforced a rule that limited the amount of wash-up time employees could have off the work floor for discussing union matters.

On 26 November the Company notified the laid off employees their temporary layoff was permanent. The Company contends it sent the 26 November notification letters not only so the employees would know they were permanently laid off but also to inform them they needed to obtain health insurance elsewhere and so they and particularly F. Gonzalez would seek employment elsewhere. I reject the

Company's contention that those were its reasons for sending the letters in question. I am persuaded the Company's real motivation for sending the letters, which converted the layoff from a temporary to a permanent one, was to preclude 10 known union supporters from voting in the 12 December election. I reject the Company's contentions with respect to the letters for several reasons. First, according to President Hewitt, the layoff was to be governed by plant rules. Plant rules reflect the laid off employees would have recall rights for one year unless their total seniority was less than that time. Therefore, the employees were already aware of their recall rights. Prior to the layoff the employees had been informed by the Company that it would continue their insurance coverage for 30 days. Thus there was no need for the Company to further inform its employees of their recall rights or insurance coverage. Plant Manager Carrier testified he was concerned about F. Gonzalez, who is handicapped, not looking for work. Carrier stated F. Gonzalez's Public Agency counselor had told him F. Gonzalez was not looking for work because International Union Representative Martinez had assured F. Gonzalez he would be recalled to work quickly. Martinez credibly denied ever telling F. Gonzalez he would be quickly recalled to work by the Company.

Other of the Company's post-layoff conduct that reflects on its motivation is that on 1 December Supervisor Elizadle told Licon the laid off employees were terminated and would not be eligible to vote in the Board-conducted election because of their union activities.[46]

In agreement with Counsel for the General Counsel, I am persuaded the evidence establishes that not only was the initial lay off motivated by union animus but the Company's decision and announcement that the layoffs were permanent came about as a result of the Company's desire to preclude its laid off employees from voting in the 12 December Board-conducted election.

On 10 December the Company further demonstrated its strong anti-union animus when President Hewitt deliberately engaged International Union Representative Martinez in an angry confrontation in the presence of many employees that resulted in his son, Engineering

---

[46] I note Superintendent Castillo was told by Plant Manager Carrier, after the employees were permanently laid off that they could not vote in the election.

Manager D. Hewitt physically assaulting Martinez.[47] Such actions clearly alerted the employees that the same fate could befall them if they continue to support the Union. At this same confrontation Plant Manager Carrier told the employees that those who had been laid off would not be considered for recall because he would see to it.

Still further evidence of the Company's overall motivation for its actions is demonstrated by Plant Manager Carrier's comments to employee Champion about his wage review. Carrier told Champion on 10 December that he was glad Champion had gotten a good review that resulted in a wage increase because if the employees voted the wrong way in the 12 December Board-conducted election they would not be getting any more favorable wage reviews. On 11 December Plant Manager Carrier asked Lewis about his personal sympathies toward the Union for no valid or justifiable reason.

Still further evidence of the Company's motivation is demonstrated by the fact that on 12 December it challenged the right of all the laid off employees (except Hoyt who did not vote) to vote, when they attempted to do so in the Board-conducted election, on the grounds the employees were permanently laid off with no reasonable expectancy of recall.

In agreement with Counsel for General Counsel, I find the evidence demonstrates the Company continued to exhibit strong anti-Union animus even after the Board-conducted election. For example, on 14 January 1987 President Hewitt spoke to all the employees and demanded to know who was supplying the Union with information on which the Union was filing charges against the Company. Hewitt even specifically singled out an employee in the group in his attempt to ascertain who was supplying information against the Company. President Hewitt told the assembled employees he did not want them to sign each other up for the Union on Company property and directed they stop doing so. Immediately after his meeting with all the employees President Hewitt singled out Licon and Vasquez for a meeting with he and Plant Manager Carrier in Hewitt's office. President Hewitt then asked the two if they were the ones supplying

---

[47] The Board has long abhorred violence as a means of attempting to achieve one's goals in labor relations. See e.g. *Jones and Laughlin Steel Corporation*, 1 NLRB 503 (1936).

information to the Union. Hewitt told the two if there were further union activities at the Company he wanted to be notified so he would not be caught off guard. Hewitt even asked and Vasquez told him they had been attempting to get employees to sign dues authorization cards before work and on their break and lunch times. Hewitt told the two they were doing it on "Company property" and he wanted it stopped. Vasquez promised Hewitt he would stop doing so.

Supervisor Elizadle voiced the Company's continued animus toward the Union on 6 March 1987 when he told certain employees, who were discussing how long it would take to negotiate a collective-bargaining agreement, that it would take at least two years and even then their efforts would be futile because the Company could delay the matter further by changing its name or relocating its facility and such actions on its part would do away with the Union.

In view of the foregoing I find Counsel for the General Counsel has established a prima facie showing sufficient to support the inference that protected conduct as a "motivating factor" in the Company's decision to lay its employees off on 10 November. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) citing with approval *Wright Line, A Division of Wright Line, Inc.*, 251 NLRB 1083 (1980) enfd. on other grounds 662 F.2d 899 (1st cir. 1981) cert. denied 455 U.S. 959 (1982). Counsel for the General Counsel demonstrated union activity by all 10 of the laid off employees in that they each had leafleted at the plant prior to their being laid off. A large percentage of them had worn or displayed union insignia of one kind or another at the plant prior to their being laid off. The Company collectively, through President Hewitt, Plant Manager Carrier, Superintendent Castillo, and Supervisor Elizadle knew of their union activities. The Company's strong anti-union animus has been demonstrated through the many unlawful acts the managers and supervisors committed prior to and after the employees were laid off. The timing of the layoff, which took place approximately four weeks before the Board-conducted election, coupled with the stated reasons for the layoff convincingly demonstrates the Company's motivation for having the layoff was to preclude these 10 known union supporters from voting in the Board conducted election which was held on 12 December.

Once Counsel for the General Counsel makes a prima facie showing, such as she has done herein, that protected conduct was a motivating factor in the employer's actions against its employees the burden shifts to the employer to demonstrate it would have taken the same actions it did even in the absence of the protected conduct on the part of its employees. The employers proffered basis must be proved by a preponderance of the evidence.

5. The Company's Economic Defense for Reducing Its Work Force on 10 November.

The Company's assertion that its 10 November temporary layoff which was thereafter made permanent on 26 November was economically justified does not withstand close scrutiny.

The Company states, "1985 was a good year" in that its total net sales, which were $10,640,000, exceeded its projections.[48] It however argues, it "never came close to achieving the success it had projected for . . . 1986." The evidence belies such a gloomy assessment of 1986. Although the Company never achieved its projected 26 percent growth in sales for 1986 it did accomplish a 14.8 percent increase in net sales for that year over 1985. The total net sales for 1986 were $12,214,000.[49] Thus if 1985 was "a good year" it is difficult to validly conclude that 1986 was a devastatingly bad one.

During the last half of 1985 the Company maintained an average of 100 hourly employees per month. In the last two months of 1985 it employed 106 (November) and 107 (December) hourly employees. During the first ten months of 1986 the Company maintained a monthly average hourly workforce of 102. In January 1986 it employed 106 hourly employees and as late as September it employed 107 hourly employees. Plant Manager Carrier, who joined the Company in February 1986, testified it was evident to him at the time he

---

[48] The Company had projected $9,697,000 in net sales for 1985.

[49] The Company had in its most recent monthly type predictions projected $13,500,00 in net sales for 1986. However, in its "Five Year Strategic Plan (1984-1988)" it set "minimum sales increase of 15% per year" goals. The Company, with its 14.8 percent net sales growth in 1986, was on target with respect to its long term projections. In that same 5 year plan the Company projected net sales for 1986 at $9,520,000. It's 1986 net sales exceeded that prediction by well over two-and-a-half million dollars.

came to the Company that it was over staffed.[50] He asserts the Company's 1986 staffing levels were based on its projected 26 percent growth in sales. Plant Manager Carrier's assertion the Company was over staffed in 1986 does not square with a number of established facts. First, the evidence shows the Company's staffing levels through October[51] were in keeping with its staffing levels for the last half of 1985, which was at a time when the Company was doing 14.8 percent less business. Secondly, the Company hired 13 new hourly paid employees between June (some four months after Carrier became Plant Manager) and October.[52] If a genuine overstaffing problem had existed, I am persuaded the Company would not have continued, up until October, to have hired new employees in order to maintain its hourly workforce at levels in excess of 100 employees. Thirdly, no conclusive evidence was presented to support Plant Manager Carrier's assertion that the new facility (which opened in August) enhanced productivity and lessened the need for employees.

The Company asserts a number of things occurred in the summer of 1986 which demonstrates its subsequent actions were not motivated by union considerations. For example, Sales Manager Salinas prepared a memoranda on 16 June for President Hewitt in which he pointed out:

> As you are aware, we are having one terrible time in filling our schedule. I would like to say that working with Bob Carrier has really help lift the burden during this trying time. I still believe the surge of work is still around the

---

[50] Carrier testified he, from the beginning of his employment, discussed the Company's over staffing problems with Superintendent Castillo. Superintendent Castillo credibly stated he could not recall any such conversation(s) prior to the layoff addressed herein. In fact, Superintendent Castillo testified he "wasn't totally sure" the Company could fill its orders without the laid off employees.

[51] It was in October that the Company learned of union activities at its facility.

[52] Plant Manager Carrier indicated he was unaware of any manufacturing employees being hired during the time period in question. However, after being confronted with documentary evidence to the contrary, he conceded hiring had taken place during that time including the hiring of his daughter (an hourly paid manufacturing employee) in June. If Carrier had been completely candid in his testimony, I think he would have remembered that his daughter had been hired during the period in question.

> corner and scheduling should be settling down to projections and normal lead times soon. [Co. Exh. 6]

Salinas said he wrote the memorandum because they were unable to give the shop employees the 5 days lead time they needed from the time an order arrived at the plant until it went to the production floor. He explained they did not have the lead time because of a decline in orders and a declining backlog. Notwithstanding the scheduling problems Salinas discussed, the Company hired two new manufacturing employees in June to replace two that had quit.[53]

President Hewitt testified he was called to corporate headquarters in Dallas, Texas in early July for a "very intense discussion" with Corporate Chief Officer Bob Haugh and Corporate Group Vice-President Andy Schwitter. Hewitt testified Haugh told him, "your sales are falling off," "your profits are falling off," "you're not going to make budget," and added he wanted something done about it. Hewitt testified the Company thereafter reduced its advertising budget and postponed some of its advertising commitments and cut two marketing consultants. Notwithstanding the concerns raised by The Dallas Corporation, the Company hired four new hourly employees in July. No hourly employees had been discharged or voluntarily quit during that month. I am persuaded that if the Company's situation had been as dire as it contends it was, it would not have continued to have hired employees [13 in all] between June and the advent of the Union in October.

On 30 October Sales Manager Salinas prepared a second memorandum for President Hewitt regarding the Company's declining business. In that memorandum Salinas stated:

> Our slide door backlog has dropped considerably over the last two weeks. Based on the orders on hand we are cutting back the vent factor 10% the first 3 1/2 days of November, and at this time it looks like we'll have to cut back an additional 10 percent over the next 5 days (week of November 10th). The vent count during the week of November 10th will be at about 22 per day average.

---

[53] One of the two hired in June was Plant Manager Carrier's daughter and the other was Davis.

> I'm hoping by the week of the 17th we can start scheduling back to the 28 per day average. I will keep you posted as we progress through the month. [Co. Exh. 7]

President Hewitt testified he penciled a message to Plant Manager Carrier across the top of Salinas' 30 October memorandum which read, "Bob C. let me have your plan." Hewitt stated Plant Manager Carrier's response to the memorandum was to provide him with a list of employees that could be laid off without adversely affecting the business.

Certain factors raise very troubling concerns about Salinas' 30 October memorandum. First, it came within a relatively short time after the Company learned of union activities at its facility. Secondly, the Company was still in a hiring posture in October. It hired two new employees to replace two that had quit that month. Thirdly, Salinas predicted the Company would be at a 22 per day vent count in the second week in November and expressed hope it could start scheduling *back* to a 28 per day vent production average in the third week in November. Salinas testified on direct examination that the Company tried to maintain, "something in the vicinity of 28 moving vents a day." On cross-examination he said that was what the Company had averaged over the past 9 to 12 months. The documents on vent production do not appear to support Salinas' testimony. For example, in 1985 the Company had approximately a 19.25 average daily vent count. Through October 1986 the Company had a 20.43 average daily vent count, and for all of 1986 it had a 20.28 average daily vent count. In the first 3 months of 1987, the Company had a 19.16 average daily vent count.[54] Thus, it appears the Company had never averaged 28 vents per day and that the vent production for November was in line with the 1986 average daily vent count and ahead of the 1985 daily count. Therefore, it appears the November layoff was based on something other than average daily vent production. Other factors support such a conclusion. The Company had never, in the past, resorted to a layoff where the employees were not thereafter recalled to work.

[54] I arrived at the average daily vent count by taking the total vent count per year (Co. Exhs. 8 and 9) and then dividing by the number of weeks in the year and the number of days per week. The Company produced approximately 5,005 vents in 1985; approximately 5,275 in 1986 (with approximately 4,495 being produced between 1 January and 30 October); and approximately 1,105 in the first 3 months of 1987.

Supervisor Elizalde's testimony that he had been having to rotate four to five employees per day during the 2 months before the layoff in order to keep them busy does not strengthen the Company's economic defense because he acknowledged, on cross-examination, he had to do that during the previous year.

I conclude the Company has not shown it would have laid off its employees on 10 November nor would it have permanently discharged them on 26 November absent their union activities.[55] Compare: *Sogard Tool Company and Adell Corporation*, 285 NLRB No. 129 (1987). Accordingly, it follows that the Company's actions toward these 10 employees violated Section 8(a)(3) and (1) of the Act and I so find.

Conclusions of Law

1. The Company, Horton Automatics, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. International Union of Electronics, Electrical, Technical, Salaried and Machine Workers, AFL-CIO, District 11, is a labor organization within the meaning of Section 2(5) of the Act.

3. By engaging in the following conduct between on and about October 1986 and on or about March 1987 the Company committed unfair labor practices in violations of Section 8(a)(1) of the Act:

(a) Threatening its employees with layoff because of their union activities.

(b) Telling its employees they would not be recalled from layoff because of their union activities.

(c) Informing its employees that their layoff was tied to their union activities.

---

[55] Although not essential to the findings herein, I note that during the first 3 months of 1985 the Company utilized 1,142 hours of overtime. In the first 3 months of 1986, it utilized 1,361 hours of overtime. However, in the first 3 months of 1987, it utilized 2,517 hours of overtime. The apparent increase in overtime hours worked appears to explain how the Company continues its normal production with 10 less employees.

(d) Promulgating and enforcing a rule limiting its employees wash-up time for the purpose of limiting the amount of time they would have off the work floor for discussing union matters.

(e) Establishing a parts runner position for the purpose of restricting its employees to their work stations so they could not discuss the Union among themselves.

(f) Assaulting a union representative in the presence of its employees.

(g) Threatening that its laid off employees would not be considered for recall because of their union activities.

(h) Coercively interrogating its employees about their union activities and desires.

(i) Promulgating and enforcing an overly broad no-solicitation rule.

(j) Telling its employees that certain actions were taken against the laid off employees because of their union activities and in order to preclude them from voting in a Board-conducted election.

(k) Telling its employees it would be futile for them to select the Union as their collective bargaining representative.

(l) Telling its employees there would not be any further wage increases if they voted for the Union.

4. On or about 10 November 1986 laying off and thereafter on or about 26 November 1986 permanently discharging Rene Carreon, Jon Eric Davis, Roy Deleon, Carlos Garcia, Joe Garcia, Franklin Gonzalez Jr., Rolando Gutierrez, Abe Herrera, Manuel Mendez, and Leonard S. Hoyt because of their sympathies for, and activities on behalf of, the Union, the Company violated Section 8(a)(3) and (1) of the Act.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that the Company has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist

therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

It having been found that the Company discriminatorily laid off and thereafter permanently discharged employees Rene Carreon, Jon Eric Davis, Roy Deleon, Carlos Garcia, Joe Garcia, Franklin Gonzalez Jr., Rolando Gutierrez, Abe Herrera, Manuel Mendez, and Leonard S. Hoyt, I shall recommend that it be ordered to offer them immediate and full reinstatement to their former positions, or if they no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them with interest. Backpay shall be computed in the manner prescribed in *F. W. Woolworth Co.*, 90 NLRB 298 (1950) with interest as computed in *New Horizons for the Retarded*, 283 NLRB No. 181 (1987).[56]

Likewise it is recommended that the Company be ordered to expunge from its laid off employees' files any reference to their having been laid off and notify them in writing this has been done and that evidence of that unlawful action will not be used as a basis for any future personnel actions against them. Further it is recommended the Company be ordered to cease giving effect to its overly broad no-solicitation rule. Finally, it is recommended the Company be ordered to post a notice to its employees attached hereto as "Appendix" for a period of 60 days in order that employees may be apprised of their rights under the Act and the Company's obligation to remedy its unfair labor practices. Counsel for the General Counsel requested that a visitorial clause be included in the order. The evidence does not establish the necessity for such a clause. Accordingly, I hereby deny that request.

On these findings of facts and conclusions of law, and on the entire record, I issue the following recommended.[57]

[56] Under *New Horizons*, interest is computed at the "short-term Federal rate" for the underpayment of taxes as set out in the 1986 amendment to 26 U.S.C. 6621. Interest accrued before 1 January 1987 (the effective date of the amendment) shall be computed as in *Florida Steel Corp.*, 231 NLRB 651 (1977).

[57] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 for the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Company, Horton Automatics, Corpus Christi, Texas, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Laying off, discharging, or otherwise discriminating against any employee for supporting International Union of Electronics, Electrical, Technical, Salaried and Machine Workers, AFL-CIO, District 11, or any other labor organization.

(b) Threatening employees with layoff because of their union activities.

(c) Telling employees they would not be recalled from layoff because of their union activities.

(d) Informing employees their layoffs were tied to their union activities.

(e) Promulgating and enforcing a rule limiting its employees wash-up time for the purpose of limiting the amount of time they would have off the work floor for discussing the Union.

(f) Establishing a parts runner position for the purpose of restricting its employees to their work stations so they could not discuss the Union among themselves.

(g) Assaulting representatives of the Union.

(h) Threatening that its laid off employees would not be considered for recall because of their union activities.

(i) Coercively interrogating its employees about their union activities and desires.

(j) Promulgating and enforcing an overly broad no-solicitation rule.

(k) Telling employees that certain actions were taken against its laid off employees because of their union activities and in order to preclude them from voting in a Board-conducted election.

(l) Telling employees it would be futile for them to select the Union as their collective bargaining representative.

(m) Telling employees there would not be any future wage increase reviews if they voted for the Union.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

(a) Offer Rene Carreon, Jon Eric Davis, Roy DeLeon, Carlos Garcia, Joe Garcia, Franklin Gonzalez Jr., Rolando Gutierrez, Abe Herrera, Manuel Mendez, and Leonard S. Hoyt immediate and full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this Decision.

(b) Remove from its files any reference to its unlawful layoff and discharge of Rene Carreon, Jon Eric Davis, Roy DeLeon, Carlos Garcia, Joe Garcia, Franklin Gonzalez Jr., Rolando Gutierrez, Abe Herrera, Manuel Mendez, and Leonard S. Hoyt and notify them in writing that this has been done and that these actions will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts of backpay due under the terms of this Order.

(d) Post at its Corpus Christi, Texas, facility, copies of the attached notice marked "Appendix."[58] Copies of the notice, on forms provided by the Regional Director for Region 23, after being signed by the Company's authorized representative, shall be posted by the Company immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by

---

[58] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

the Company to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 23 in writing within 20 days from the date of this Order what steps the Company has taken to comply herewith.

Dated, Washington, D.C. 27 November 1987

William N. Cates
Administrative Law Judge

"APPENDIX"

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with layoff because of your activities on behalf of International Union of Electronics, Electrical, Technical, Salaried and Machine Workers, AFL-CIO, District 11, or any other labor organization.

WE WILL NOT tell you that you will not be recalled from layoff because of your activities on behalf of the Union.

WE WILL NOT inform you that your layoff was tied to your activity on behalf of the Union.

WE WILL NOT promulgate rules that limit your wash-up time or restrict you to your work stations for the purpose of restricting you from discussing the Union.

WE WILL NOT assault representatives of the Union.

WE WILL NOT threaten that our laid off employees would not be considered for recall because of their activities on behalf of the Union.

WE WILL NOT coercively interrogate you regarding your union activities and desires.

WE WILL NOT tell you that certain actions were taken against our laid off employees because of their activities on behalf of the Union and in order to preclude them from voting in a Board-conducted election.

WE WILL NOT tell you it would be futile for you to select the Union as your collective bargaining representative.

WE WILL NOT tell you there will not be any future wage increase reviews if you vote for the Union.

WE WILL NOT layoff or discharge our employees because of their support for, assistance to, or membership in, the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Rene Carreon, Jon Eric Davis, Roy DeLeon, Carlos Garcia, Joe Garcia, Franklin Gonzalez Jr., Rolando Gutierrez, Abe Herrera, Manuel Mendez, and Leonard S. Hoyt immediate and full reinstatement to their former positions, or, if their jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits they may have suffered as a result of our discrimination against them, less any net interim earnings, plus interest.

WE WILL notify each of them that we have removed from our files any reference to their layoff and their layoff will not be used against them in any way.

HORTON AUTOMATICS
(Employer)

Dated:

By:(
Representative)(Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Bob Casey Federal Building/Courthouse, 515 Rusk Street, Room 4014, Houston, Texas 77002. Telephone (713) 229-3748.

Supreme Court, U.S.
FILED
MAR 23 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1176

In the Supreme Court of the United States

OCTOBER TERM, 1989

HORTON AUTOMATICS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether substantial evidence supports the Board's conclusion that petitioner violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), by discharging employees shortly before a Board-conducted representation election in order to prevent those employees from voting.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	7
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Horton Automatics, 286 N.L.R.B. No. 134 (1988)	3
Limestone Apparel Corp. 255 N.L.R.B. 722 (1981)	9
NLRB v. *Downslope Indus., Inc.*, 676 F.2d 1114 (6th Cir. 1982)	8
NLRB v. *Transportation Management Corp.*, 462 U.S. 393 (1983)	9
NLRB v. *United Bhd. of Carpenters*, 230 F.2d 256 (1st Cir. 1956)	8
Pioneer Drilling Co. v. *NLRB*, 391 F.2d 961 (10th Cir. 1968)	8
Universal Camera Corp. v. *NLRB*, 340 U.S. 474 (1951)	7, 8
Wright Line, A Division of Wright Line Inc., 251 N.L.R.B. 1083 (1980) enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982)	9

Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 8(a)(1), 29 U.S.C. 158(a)(1)	3, 4, 5, 6, 7
§ 8(a)(3), 29 U.S.C. 158(a)(3)	3, 4, 6

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1176

HORTON AUTOMATICS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-21a) is unpublished, but the decision is noted at 884 F.2d 574 (Table). The decision and order of the National Labor Relations Board (Pet. App. 22a-23a), including the decision and recommended order of the administrative law judge (Pet. App. 24a-71a), is reported at 289 N.L.R.B. No. 57.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1989. A petition for rehearing was denied on October 2, 1989. Pet. App. 1a-2a. On December 2, 1989, Justice White extended the time within which to file a petition for a writ of certiorari to and including January 25, 1990, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, located in Corpus Christi, Texas, designs and manufactures customized automatic doors and related products. Pet. App. 4a, 25a. On October 9, 1986, the National Labor Relations Board notified petitioner that the International Union of Electronics, Electrical, Technical, Salaried and Machine Workers, AFL-CIO, District 11 (the Union), had filed an election petition seeking to represent petitioner's hourly paid production and maintenance employees—approximately 105 employees. On October 30, the Board set a representation election for December 12, 1986. *Id.* at 5a, 24a.

On November 3 and 4, however, petitioner notified its bargaining unit employees of an impending temporary layoff, and explained that the "layoff would be instituted according to seniority, as provided in the Company handbook, and * * * that [w]hen work picks up again employees will be recalled . . ." Pet. App. 6a (internal quotation marks omitted; brackets in original). Several days later, on November 7, petitioner told ten production employees that they would be laid off effective November 10. And on November 26, petitioner notified all of the laid off employees in writing that they were fired as of that date. *Id.* at 6a, 27a.

2. The Board conducted the representation election, as scheduled, on December 12, 1986. Nine of the laid off employees cast ballots; petitioner challenged those ballots on the ground that the employees had been fired and had no reasonable expectation of being rehired. Pet. App. 6a, 27a-28a.[1]

On January 12, 1987, the Union filed with the Board unfair labor charges against petitioner alleging that the firm had engaged in specific violations of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), beginning in October 1986 and continuing beyond the date of the election. The Union further claimed that petitioner's November 10 "temporary" layoff and November 26 "permanent" layoff violated Section 8(a)(3) and (1) of the Act, 29 U.S.C. 158 (a)(3) and (1). Pet. App. 7a, 24a-25a.

On February 20, 1987, the Board's General Counsel issued an unfair labor practice complaint based on the Union's charges. The complaint was tried before an Administrative Law Judge in March and May 1987. Pet. App. 7a, 24a-25a.

3. Adopting the findings and conclusions of the ALJ, the Board found that petitioner had violated Section 8(a)(1) of the Act by many coercive acts, including threatening employees with the layoff of union supporters and telling employees that they would not be recalled because of their union activities. Pet. App.

---

[1] Apart from the nine challenged ballots, petitioner's employees cast 43 ballots in favor of union representation and 43 ballots in opposition. *Horton Automatics*, 286 N.L.R.B. No. 134 (1988). As the court of appeals noted, "[t]he outcome of the election is still unresolved since the challenged ballots will determine the outcome." Pet. App. 6a n.2. The Board has decided not to count the challenged ballots until the final disposition of the instant case. See *ibid.*

23a, 28a-32a, 41a, 45a.[2] The Board found that petitioner had further violated Section 8(a)(1) by the following actions: changing plant rules and restricting employee mobility to prevent employees from discussing unionization, Pet. App. 32a-36a; forbidding solicitation of union support on non-work time, *id.* at 43a-45a; deliberately creating a confrontation with Union Representative Martinez in order to reduce employee support for the Union, *id.* at 36a-41a; interrogating employees about their union preferences and activities, *id.* at 41a-43a, 48a-49a; threatening employees that wage increases would end if the Union were certified, *id.* at 47a-48a; and predicting that the firm could take steps that "would do away with the Union," *id.* at 46a.

The Board determined that petitioner had violated Section 8(a)(1) and (3) of the Act by laying off and then firing ten bargaining unit employees during the election campaign because of their union activities.

---

[2] The Board found that in late October or early November 1986, Supervisor Elizalde told an employee that "a layoff [was] coming around because of union activities." Pet. App. 28a. The Board did not credit Elizalde's different version of the conversation. As the ALJ explained, "Elizalde was not an impressive witness. His recollection on cross-examination was selective and poor." *Id.* at 29a. The Board further credited another employee's testimony that Elizalde said that he doubted that petitioner would recall the laid off employees, and that the reason was "union." *Id.* at 30a. Again, the Board did not credit Elizalde's contrary testimony because his "demeanor and the full record evidence convince[d] [the Board that] he was not fully candid in his recall of this conversation." *Id.* at 31a.

The Board also found that in early November 1986, Superintendent Castillo "clearly conveyed to [employees] the message that the layoff was tied to their union activities." Pet. App. 32a.

Pet. App. 49a-64a. The Board found that petitioner knew about the laid off employees' support for the Union. *Id.* at 59a.[3] The Board also found that the previously documented violations of Section 8(a)(1), which petitioner's managers and supervisors committed both before and after the layoff, revealed the firm's strong anti-union animus. The Board thus concluded that the "timing of the layoff, which took place approximately four weeks before the Board-conducted election, coupled with the stated reasons for the layoff[,] convincingly demonstrate[d] [that petitioner's] motivation for having the layoff was to preclude these 10 known union supporters from voting in the * * * election." Pet. App. 59a; see note 2, *supra*.

The Board rejected petitioner's contention that the temporary layoffs "were brought about by economic necessity." Pet. App. 50a; see *id.* at 60a.[4] And the Board concluded that petitioner's asserted justification

---

[3] The Board specifically found that before the layoff, those employees had distributed union leaflets at the plant and had worn or displayed union insignia. Pet. App. 59a. And the Board found that petitioner "collectively, through President Hewitt, Plant Manager Carrier, Superintendent Castillo, and Supervisor Elizadle [*sic*] knew of their union activities." *Ibid.*

[4] The Board found that although petitioner had not met its projected sales in 1986, the firm's actual sales exceeded the previous year's figures. Despite that increase, petitioner had not expanded its work force. Pet. App. 60a-61a. The Board also determined that petitioner's hiring of replacement workers until shortly before the layoff undercut the firm's alleged concern with overstaffing. And the Board noted that petitioner's use of overtime had nearly doubled after the November 10 layoff, which "appears to explain how [petitioner] continues its normal production with 10 [fewer] employees." *Id.* at 64a n.55.

for making the November 10 layoffs permanent was pretextual. *Id.* at 64a.[5] As the Board explained, the evidence showed that petitioner's decision and November 26 announcement "that the layoffs were permanent came about as a result of [petitioner's] desire to preclude its laid off employees from voting in the 12 December Board-conducted election." *Id.* at 57a.

4. The court of appeals enforced the Board's order in an unpublished decision. Pet. App. 3a-21a. The court did not resolve whether petitioner's November 10 layoff was unlawfully motivated, since the court concluded that substantial evidence supported the Board's finding that petitioner had permanently laid off the employees on November 26 for discriminatory reasons, in violation of Section 8(a)(1) and (3) of the Act. Pet. App. 7a-8a, 12a. And in reaching that conclusion, the court determined that it was not unreasonable for the Board "to draw an inference of anti-union animus from the timing of the November 26 notice itself." *Id.* at 11a. The court noted that the record showed that petitioner's supervisors had seen some of the laid off employees distributing union leaflets, "that the layoff became an issue in the election[,] that [petitioner] feared that the outcome of the election would be close," *ibid.*, and that petitioner

---

[5] Petitioner contended that it sent the notification letters "not only so the employees would know they were permanently laid off but also to inform them they needed to obtain health insurance elsewhere and so they and particularly F. Gonzalez [a handicapped employee] would seek employment elsewhere." Pet. App. 56a. The Board rejected that explanation, noting, among other things, that petitioner had already told the employees that the layoff and recall would be governed by the firm's handbook and that their insurance coverage would lapse after 30 days. *Id.* at 57a.

"had never made permanent layoffs before November 26, 1986," *ibid.*[6]

ARGUMENT

1. Petitioner contends (Pet. 6-14) that in enforcing the Board's order, the court of appeals misapplied the "substantial evidence" standard of review. In *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951), this Court stated that in evaluating the substantiality of evidence supporting the Board's findings, a reviewing court must "canvass[] 'the whole record'" and "take into account whatever in the record fairly detracts from [the] weight [of the supporting evidence]," *id.* at 488. In performing that function, "a court may [not] displace the Board's choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Ibid.* And the reviewing court must give particular weight to the credibility determinations of an "examiner who has observed the witnesses and lived with the case." *Id.* at 496.

Contrary to petitioner's sweeping submission, the court of appeals here properly applied that governing standard of review. See, *e.g.*, Pet. App. 7a. At bottom, petitioner argues (Pet. 7-11) that the court of appeals erred in considering whether substantial evidence supported the Board's findings concerning the November 26 permanent layoff, apart from whether

---

[6] After reviewing the record and deferring to the Board's credibility determinations, the court of appeals enforced the Board's order with respect to petitioner's various violations of Section 8(a)(1) of the Act. Pet. App. 12a-21a. The court did note that it might have resolved certain credibility determinations differently if it had authority to review the case *de novo*. See, *e.g.*, *id.* at 13a.

such evidence supported findings regarding the November 10 layoff. But even assuming petitioner had a valid economic reason for temporarily laying off the ten employees, the evidence amply supported the Board's finding that petitioner converted that action into a permanent layoff for an impermissible reason—to preclude the employees from voting in what petitioner expected to be a close representation election. And those two propositions are by no means inconsistent, particularly where, as here, "[i]t is uncontroverted that [petitioner] had never made permanent layoffs before November 26, 1986," Pet. App. 11a.[7]

Petitioner also suggests (Pet. 13-14) that further review is warranted because the circuits have used "conflicting standards" in applying *Universal Camera*. As this Court observed in *Universal Camera*, 340 U.S. at 489, the "precise way in which courts interfere with agency findings cannot be imprisoned within any form of words * * *. There are no talismanic words that can avoid the process of judgment." For that reason alone, the different verbal formulations adopted by various courts of appeals to describe that "process of judgment" do not reflect any substantive disagreement (or disarray, for that matter) requiring intervention by this Court.

---

[7] Petitioner also contends (Pet. 8-9) that, having rejected certain testimony relied upon by the Board, the court of appeals should have rejected other testimony of the same witnesses. But the courts of appeals have long agreed that a witness's testimony "need not [be] treat[ed] * * * as indivisible, for acceptance or rejection only as a unit." See, *e.g.*, *NLRB* v. *Downslope Indus., Inc.*, 676 F.2d 1114, 1116 (6th Cir. 1982); *Pioneer Drilling Co.* v. *NLRB*, 391 F.2d 961, 964 n.3 (10th Cir. 1968); *NLRB* v. *United Bhd. of Carpenters*, 230 F.2d 256, 259 (1st Cir. 1956).

2. Petitioner further contends (Pet. 14-16) that the court of appeals failed to apply the mixed-motive test announced by the Board in *Wright Line*,[8] and approved by this Court in *NLRB* v. *Transportation Management Corp.*, 462 U.S. 393 (1983). Under the *Wright Line* analysis, where evidence before the Board shows that an employer's opposition to union activity was a substantial or motivating factor in his decision to take adverse action against an employee, the employer's action will be an unfair practice unless the employer establishes that he would have taken the action even if the employee had not engaged in protected union activity. *NLRB* v *Transportation Management Corp.*, 462 U.S. at 401-403. But in order for the *Wright Line* analysis to apply in a given case, the employer must advance—and the record must support—a legitimate, non-pretextual reason for adverse action. Where the Board finds that the employer's proffered reason is a pretext to disguise unlawful discrimination, the *Wright Line* analysis is unnecessary:

> [A] finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel.

Limestone Apparel Corp., 255 N.L.R.B. 722, 722 (1981); see also *NLRB* v. *Transportation Management Corp.*, 462 U.S. at 400 n.5.

Here, the Board found, and the court of appeals agreed, that petitioner's proffered explanation for the

---

[8] *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083 (1980), enforced, 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982).

November 26 firings was not credible. Since petitioner, on this record, did not show any legitimate motive for its action, petitioner necessarily failed to satisfy its burden of showing that the discharges would have occurred even without the demonstrated anti-union motivation. Thus the decision below is wholly consistent with the *Wright Line* analysis.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JERRY M. HUNTER
General Counsel

D. RANDALL FRYE
Associate General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

CARMEL P. EBB
Attorney
National Labor Relations Board

MARCH 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 821